

THE CONCEPT OF THE WELFARE OF THE CHILD

DOUGLAS EDGAR FISHER

Ph.D.

UNIVERSITY OF EDINBURGH

1978



TABLE OF CONTENTS

	Para.	Page.
TABLE OF STATUTES		xxxiii
TABLE OF STATUTORY INSTRUMENTS		xlix
TABLE OF CASES		lv
LIST OF ABBREVIATIONS		Lxxxi
SUMMARY		Lxxxvi

A - INTRODUCTION

PART 1 - GENERAL

1	-	THE CONTEXT AND BACKGROUND		
	1.	The purpose of the study	1.1	1
	2.	The nature of the study	1.7	4
	3.	Methodology	1.16	9
	4.	The definition of expressions	1.29	16
2	-	THE ROLE OF WELFARE IN THE LEGAL SYSTEM		
	1.	Introduction	2.1	24
	2.	The historical evolution of current principles	2.3	25
	3.	The concept of authority	2.17	33

	Para.	Page
4. The function of the legal system		
(a) The creation of authority	2.24	38
(b) The exercise of authority	2.27	40
(c) The approach to welfare	2.32	44
(d) The role of welfare	2.38	48
(e) The nature of welfare	2.41	50

B - THE STATIC ANALYSIS OF WELFARE

PART 2 - CLASSIFICATION OF WELFARE

3 - THE OBJECTIVE TREATMENT OF WELFARE

1. Classification: general

(a) Introduction	3.1	53
(b) Policy	3.3	54
(c) Welfare models	3.4	55

2. Objective welfare treated objectively

(a) Table 1	3.9	58
-------------	-----	----

TABLE 1

(b) Independent provisions	3.10	78
(c) Dependent provisions	3.13	80
(d) Subordinate legislation	3.15	82
(e) An inchoate threshold approach	3.18	84

3. Objective welfare treated functionally

(a) Table 2	3.21	86
-------------	------	----

Para. Page

TABLE 2

87

(b) The nature of the functional approach	3.22	99
(c) Subordinate legislation	3.28	103
(d) Enforcement	3.29	104

4 - THE GENERALISED TREATMENT OF WELFARE

1. Introduction	4.1	106
-----------------	-----	-----

TABLE 3 108

2. Welfare as a statutory objective	4.4	122
3. Welfare as a statutory factor	4.9	127
4. Welfare as justification for release from a duty	4.15	131

5 - WELFARE AND THE EXERCISE OF DISCRETIONS

1. Introduction	5.1	137
2. Welfare as a threshold requirement		
(a) General	5.3	138

TABLE 4 139

(b) The nature of the threshold requirements	5.5	149
(c) The question of choice	5.15	156
(d) The problem of future welfare	5.20	159

3. The exercise of a discretion

(a) Introduction	5.29	167
------------------	------	-----

TABLE 5

(b) Discretions and their context	5.32	176
(c) Restrictions upon the exercise of discretions	5.38	180

6 - THE SUBSTANCE OF WELFARE

1. Introduction	6.1	190
2. Procedural safeguards	6.4	192

TABLE 6

3. Education	6.7	200
--------------	-----	-----

TABLE 7

4. Religion	6.13	207
-------------	------	-----

TABLE 8

5. Protection of interests other than those of children	6.18	215
---------------------------------------------------------	------	-----

TABLE 9

6. Regulation making powers	6.26	228
-----------------------------	------	-----

TABLE 10

7. Conclusion	6.31	234
---------------	------	-----

PART 3 - INTERPRETATION AND POLICY

7 - THE BACKGROUND TO WELFARE AS POLICY

1. Introduction	7.1	235
2. Victorian legislative policy	7.3	236
3. Modern legislative policy	7.8	240

8 - THE RELEVANCE OF WELFARE AS POLICY

1. Introduction	8.1	248
2. The normal approach	8.3	250
3. The exceptional approach in England		
(a) Introduction	8.6	253
(b) English matrimonial legislation	8.8	254
(c) English guardianship and custody legislation	8.14	260
(d) English adoption legislation	8.15	261
(e) English criminal legislation	8.16	262
(f) Miscellaneous English legislation	8.19	265
4. The exceptional approach in Scotland		
(a) Introduction	8.20	266
(b) Scottish criminal legislation	8.21	266
(c) Other Scottish legislation	8.26	271
5. Conclusion	8.31	278

9 - THE PROTECTION OF CHILDREN AS POLICY

1. Introduction	9.1	281
2. England	9.2	281
3. Scotland	9.5	284
4. Conclusion	9.13	291

10 - WELFARE AND THE TECHNIQUES OF INTERPRETATION

1. Introduction	10.1	293
2. The liberal approach : England	10.2	293
3. The liberal approach : Scotland	10.8	297
4. Conclusion	10.12	301

PART 4 - WELFARE AND THE CRIMINAL LAW

11 - THE 1933 and 1937 ACTS OFFENCES

1. Introduction	11.1	302
2. The general approach		
(a) The historical background	11.3	304
(b) The structure of the provisions	11.5	306
(c) The meaning of wilful	11.7	308
(d) Is the legislation a restrictive code	11.12	315
3. Neglect		
(a) Deficient care	11.16	318
(b) Failure to provide money	11.20	321

	Para.	Page
4. Other grounds for conviction	11.24	326
5. The persons liable to be affected by the legislation		
(a) The background	11.28	330
(b) The legislation	11.32	333
6. Conclusion	11.38	339
 12 - OTHER STATUTORY OFFENCES		
1. Introduction	12.1	341
2. Abandonment and exposure	12.5	343
3. Children in licensed premises	12.8	346
4. Death of the child	12.9	347
5. Abortion	12.13	350
 13 - THE CONTRIBUTION OF THE COMMON LAW		
1. Introduction	13.1	354
2. Cruel and unnatural treatment	13.8	359
3. Endangering and imprisoning a child	13.16	366
4. Parental rights approach		
(a) Scotland	13.20	368
(b) England	13.23	371
5. Conclusion	13.28	375
 TABLE		378

C - THE DYNAMIC ANALYSIS OF WELFARE

PART 5 - THE INTERVENTION OF THE STATE : OFFICIAL CARE

14 - OFFICIAL CARE THRESHOLD REQUIREMENTS :
THE ADMINISTRATIVE REGIME

	Para.	Page
1. Introduction	14.1	381
2. The formal structure of the provisions	14.4	384
3. The historical background	14.11	390
4. The concepts underlying the administrative regime		
(a) Loss or abandonment	14.17	394
(b) Delegation of parental rights	14.20	398
(c) Incapacity and unfitness	14.25	402

15 - OFFICIAL CARE THRESHOLD REQUIREMENTS :
THE JUDICIAL REGIME

1. Introduction	15.1	406
2. Civil and criminal criteria in the early legislation	15.4	408
3. The requirements in general		
(a) Introduction	15.16	417
(b) The background to the Scottish approach	15.17	419
(c) The legislation in detail: England and Scotland	15.21	423
(d) The approach to the threshold requirements: Scotland	15.25	428
(e) The approach to the threshold requirements: England	15.38	437

	Para.	Page
4. The individual grounds		
(a) Exposure to moral danger	15.42	440
(b) The "sibling" effect	15.49	446
5. The statutory balance between parent and child	15.52	449
16 - THE STATUS OF CHILDREN RECEIVED INTO CARE		
1. Introduction	16.1	457
2. Abandonment and delegation	16.2	458
3. The judicial view of the scheme of section 1		
(a) The earlier cases	16.7	462
(b) The more recent cases	16.12	468
(c) Policy, the Court of Appeal and the Court of Session		
(i) Policy	16.16	473
(ii) The Court of Appeal	16.18	476
(iii) The Court of Session	16.23	480
4. Conclusion	16.27	485
17 - THE STATUS OF CHILDREN COMPULSORILY IN CARE		
1. Introduction	17.1	488
2. The statutory schemes		
(a) Assumption of parental rights	17.3	489
(b) Committal to the care of a local authority	17.19	502
3. The concept of local authority guardianship	17.23	506

	Para.	Page
4. The effect of the old system "fit person" orders	17.32	513
5. The effect of assumption of parental rights	17.38	520
6. Conclusion		
(a) General	17.48	532
(b) Academic commentaries	17.51	534
(c) The judicial decisions	17.57	540
 18 - OFFICIAL CARE LEGISLATION AND DISCRETIONS - PART I		
1. Adjudication and discretion	18.1	546
2. The importance of discretion	18.9	552
3. The nature of the statutory discretion		
(a) Local authority powers	18.16	560
(b) The powers of the juvenile Court	18.21	564
(c) The powers of children's hearings	18.27	571
4. Welfare, discretions and the judiciary		
(a) General	18.29	574
(b) The function of the child's best interests	18.30	575
(c) Grounds for referral and the dispositional discretion	18.37	581
5. Conclusions	18.48	588

19 - OFFICIAL CARE LEGISLATION AND DISCRETIONS - PART II

	Para.	Page
1. Introduction	19.1	592
2. The screening process in England		
(a) Preventive measures	19.3	594
(b) The duty to bring care proceedings	19.5	596
(c) Emergency detention	19.11	601
(d) The investigative process	19.16	606
3. The screening process in Scotland		
(a) The functions of the reporter	19.17	607
(b) The liability of children to prosecution	19.23	610
4. The treatment of juvenile offenders	19.34	619
5. Conclusions	19.45	629

20 - THE SYSTEM OF CHILD CARE IN PRACTICE

1. Criticisms of discretions	20.1	632
2. Criticisms of the 1969 Act		
(a) Local authority executive powers	20.5	634
(b) Shortages of staff and accommodation	20.10	639
3. Children's hearings in Scotland	20.13	642

	Para.	Page
4. Child protection and child abuse		
(a) The background	20.22	648
(b) Child abuse in general		
(i) The nature of the problem	20.25	650
(ii) Criminal law and the police	20.29	654
(iii) Civil remedies and procedures	20.32	656
(c) Failings in the system : possible solutions	20.45	667
- 21 - THE MARIA COLWELL CASE		
1. Introduction	21.1	679
2. The Report		
(a) General	21.5	682
(b) The legal events	21.8	683
(c) The legal rules		
(i) The foster parents	21.12	686
(ii) The application to discharge the care order	21.16	689
(iii) The criteria relevant to discharging the care order	21.19	692
(iv) The consequences of the various orders	21.30	700
(d) Conclusions	21.33	701

	Para.	Page
3. The Howells analysis	21.37	703
4. Conclusion	21.46	709

PART 6 - ADOPTION

22 - THE STRUCTURE OF THE ADOPTION LEGISLATION

1. General	22.1	711
2. The structure of the 1958 Act	22.4	713
3. The structure of the 1975 Act		
(a) General	22.11	717
(b) Section 3 of the 1975 Act	22.14	720
4. Conclusion	22.20	725

23 - GENERAL THRESHOLD REQUIREMENTS

1. Introduction	23.1	726
2. Criteria relating to the prospective adopters	23.6	729
3. Criteria relating to the child to be adopted	23.15	738
4. Section 10 of the 1930 Act in Scotland	23.20	742

24 - ADOPTION - THE CARE AND POSSESSION REQUIREMENT

1. Introduction	24.1	754
2. The Scottish approach	24.7	758
3. The English approach	24.19	769
4. The "home" test	24.23	772

25 - THE APPROACH TO THE WELFARE REQUIREMENT

	Para.	Page
1. Introduction	25.1	777
2. The background to section 3		
(a) The Houghton-Stockdale Report	25.8	782
(b) The discussion in Parliament	25.12	785
3. The judicial function and the welfare requirement	25.20	791
4. The courts and the welfare requirement		
(a) Introduction	25.28	797
(b) The role of the welfare requirement	25.30	798
(c) Satisfaction of the welfare requirement	25.48	812
5. Conclusion	25.59	820

26 - THE SUBSTANCE OF THE WELFARE REQUIREMENT

1. Introduction	26.1	822
2. Individual welfare	26.5	825
3. Policy considerations		
(a) Introduction	26.8	828
(b) Adoption by parents of their legitimate children	26.11	829
(c) Adoption by parents of their illegitimate children		
(i) Competency	26.21	836
(ii) Expediency	26.27	842

	Para.	Page
(d) Adoption by grandparents		
(i) Introduction	26.35	849
(ii) Continuity of relationship	26.37	851
(iii) Age differentials	26.48	859
(iv) Financial security	26.51	861
(e) Adoption by other relatives	26.54	863
(f) Other adoptions	26.56	865
4. Conclusion	26.59	866
 27 - THE SIGNIFICANCE OF PARENTAL CONSENT OR AGREEMENT		
- 1. Introduction	27.1	871
2. The development of the requirement	27.4	872
3. The provisions of the Acts	27.7	875
4. Judicial attitudes to the requirement		
(a) General issues		
(i) The interests protected by the requirement	27.16	881
(ii) The interest of the putative father	27.23	887
(b) Specific issues	27.27	890
5. The consent of the minor	27.34	897
 28 - DISPENSATION : THE OBJECTIVE GROUNDS		
1. Introduction	28.1	902
2. The judicial approach to the grounds		
(a) General	28.6	906

	Para.	Page
(b) Abandonment	28.9	908
(c) Neglect and ill-treatment	28.15	913
(d) Failure to discharge parental duties	28.16	913
(e) The case of R in 1973	28.21	918
(f) Absence and incapacity	28.27	924
3. Conclusion	28.31	927
29 - DISPENSATION : UNREASONABLE WITHHOLDING : BEFORE 1971		
1. Introduction	29.1	929
2. The structure and policy of the legislation		
(a) Policy	29.4	932
(b) The statutory text	29.11	938
3. The judicial approach		
(a) Introduction	29.14	941
(b) General principles	29.16	943
(c) The attitudes and conduct of the parents	29.29	955
(d) The role of welfare	29.35	960
4. The position in Scotland	29.48	971
5. The substance of welfare	29.57	977
30 - DISPENSATION : UNREASONABLE WITHHOLDING : AFTER 1971		
1. The English decision of the House of Lords		
(a) Introduction	30.1	986
(b) The test of reasonableness	30.3	988
(c) The standard of reasonableness	30.5	990

	Para.	Page
(d) Welfare and reasonableness	30.9	993
(e) The role of welfare	30.12	997
(f) The nature of welfare	30.18	1002
(g) Summary of the function of welfare	30.24	1007
(h) The achievement of a balance	30.25	1008
(i) The meaning of welfare	30.28	1011
 2. The Scottish decision of the House of Lords		
(a) Introduction	30.31	1013
(b) The meaning of welfare	30.32	1014
(c) The approach to the test of reasonableness	30.33	1015
(d) The achievement of a balance	30.37	1018
(e) The negative aspect of welfare	30.40	1020
(f) The natural parents' interest	30.43	1022
 3. The effect of the House of Lords' decisions	30.48	1027
 4. Subsequent developments and the 1975 Act		
(a) Introduction	30.65	1035
(b) The Houghton-Stockdale Report	30.67	1037
(c) Parliament	30.69	1039
(d) The effect of the 1975 Act	30.71	1040

31 - SUBSTANTIVE DISCRETIONS AND THE ADOPTION PROCESS

	Para.	Page
1. Introduction	31.1	1050
2. Specific discretions		
(a) Separation of children and parents	31.7	1053
(b) Religion	31.11	1056
(c) Male applicants for female children	31.14	1059
(d) Joint proceedings	31.17	1062
(e) The imposition of conditions		
(i) General	31.18	1063
(ii) Enforceability	31.21	1065
(iii) The exercise of the power	31.24	1067
3. Conclusion	31.29	1071

PART 7 - GUARDIANSHIP AND CUSTODY

32 - THE HISTORICAL ANTECEDENTS OF THE MODERN LEGISLATION

1. Introduction	32.1	1074
2. Developments in Scotland before the 19th century		
(a) The position of the father : the patria potestas	32.7	1078
(b) The position of the mother: illegitimate children	32.19	1085
(c) The appointment of guardians	32.23	1088

	Para.	Page
(d) Disputes between guardian and parents	32.30	1092
3. Developments in England before the 19th century		
(a) General	32.39	1099
(b) The common law of guardianship until 1660		
(i) Introduction	32.43	1102
(ii) Guardians in chivalry and in socage	32.45	1103
(iii) Guardians by nature and by nurture	32.49	1106
(iv) Forfeiture of the office of guardian	32.53	1109
(c) The influence of equity during the 18th century		
(i) Introduction	32.65	1118
(ii) Habeas corpus	32.70	1122
(iii) Equitable intervention	32.74	1130
4. Conclusions	32.81	1130
33 - THE POSITION PRIOR TO THE STATUTORY REFORMS : SCOTLAND		
1. Introduction	33.1	1134
2. The general approach to the interests of the child		
(a) The influence of the patria potestas	33.4	1136
(b) The interests of the child	33.16	1145
3. Guardianship		
(a) The father as administrator	33.25	1153

	Para.	Page
(b) Forfeiture and disqualification	33.29	1156
4. The patria potestas		
(a) The general approach	33.41	1165
(b) Disqualification	33.55	1174
(c) The Conjugal Rights Act of 1861	33.75	1186
(d) Non-parental disputes	33.102	1206
5. The jurisdiction of the sheriff	33.106	1209
34 - THE POSITION PRIOR TO THE STATUTORY REFORMS - ENGLAND		
1. Introduction	34.1	1219
2. Law and policy in 1839		
(a) General	34.5	1222
(b) The Court of Chancery	34.8	1224
(c) The Court of King's Bench	34.15	1230
3. The policy of the legislation		
(a) The intention of the legislators	34.20	1235
(b) The new judicial function	34.24	1241
4. The influence of religion		
(a) Introduction	34.39	1251
(b) The position of the guardian	34.41	1252
(c) Paternal right and custody	34.43	1254
(d) The Agar-Ellis decisions	34.46	1257
(e) The father's wishes on religion	34.55	1263

	Para.	Page
(f) Conclusion	34.67	1273
5. Consensual arrangements		
(a) Introduction	34.69	1274
(b) The Court of Chancery	34.71	1275
(c) The amending legislation	34.78	1279
(d) Arrangements about religion	34.86	1285
6. Matrimonial causes		
(a) Introduction	34.92	1290
(b) The approach to section 35	34.97	1293
(c) The criteria used in the exercise of the discretion	34.105	1299
35 - THE CONTEMPORARY LEGISLATION - I		
1. Introduction	35.1	1302
2. The Guardianship of Infants Act 1886		
(a) Policy		
(i) Background	35.5	1305
(ii) The move towards parental equality	35.9	1307
(iii) The mother's application for custody	35.14	1310
(b) The role of welfare		
(i) Unregulated discretions	35.19	1315
(ii) Negative welfare	35.24	1318
(iii) Positive references to welfare	35.31	1322

	Para.	Page
3. The Custody of Children Act 1891		
(a) Policy		
(i) Introduction	35.44	1329
(ii) The protection of foster children	35.49	1332
(iii) The role of welfare	35.53	1335
(b) The structure of the Act		
(i) General	35.58	1339
(ii) Section 1	35.61	1341
(iii) Section 3	35.63	1343
(iv) The relationship between sections 1 and 3	35.65	1345
4. The Guardianship of Infants Act 1925		
(a) Policy		
(i) Introduction	35.72	1349
(ii) The main streams of policy	35.75	1352
(b) The legislation		
(i) Introduction	35.77	1354
(ii) Its application	35.81	1357
(iii) The welfare principle	35.85	1359
(iv) Parental equality	35.89	1362
(v) The section as a whole	35.92	1363

36 - THE CONTEMPORARY LEGISLATION -II

	Para.	Page
1. Introduction	36.1	1367
2. Changes before 1958	36.2	1367
3. Questions of principle since 1958		
(a) Parental equality	36.12	1374
(b) Safeguards for children in the divorce legislation	36.20	1380
4. Procedures and structures since 1958		
(a) Introduction	36.27	1385
(b) The availability of local authority care resources	36.30	1387
(c) The availability of alternative options	36.37	1392
(d) The function of welfare	36.49	1399

37 - WELFARE AND GUARDIANSHIP

1. Scotland		
(a) Introduction	37.1	1408
(b) The nature of guardianship	37.9	1414
(c) Techniques of removal and appointment	37.15	1419
(d) The guardian's duties	37.17	1421
(e) Criteria for disqualification		

	Para.	Page
(i) Parental guardians	37.23	1426
(ii) Non-parental guardians	37.27	1430
(f) Conclusion	37.29	1433
2. England		
(a) Introduction	37.34	1437
(b) The powers of a guardian	37.28	1440
(c) The powers of the Court		
(i) Appointment of guardians	37.41	1442
(ii) Removal of guardians	37.50	1450
(iii) Supervision of guardians	37.55	1454
(d) Conclusion	37.60	1457
38 - STATUTORY THRESHOLD REQUIREMENTS		
1. Introduction	38.1	1459
2. The Acts of 1839 and 1886	38.6	1462
3. The 1891 Act		
(a) General	38.13	1466
(b) Problems of application and jurisdiction		
(i) Application	38.16	1469
(ii) Jurisdiction	38.22	1473
(c) Neglectful parents	38.29	1479
(d) Abandonment and desertion	38.42	1486
(e) The function of welfare	38.48	1490

	Para.	Page
4. The 1891 Act in operation	38.56	1496
39 - THE CONTEMPORARY APPROACH TO WELFARE : THE NOBILE OFFICIUM IN SCOTLAND		
1. Introduction	39.1	1503
2. Non-parental disputes		
(a) The earlier cases	39.4	1505
(b) The present position	39.8	1510
3. Disputes between parents and third parties		
(a) Introduction	39.11	1513
(b) The threshold approach		
(i) The traditional attitude	39.14	1515
(ii) The modified attitude	39.16	1517
(iii) The influence of the legislation	39.21	1521
(c) The role of the judicial discretion	39.35	1530
4. Inter-parental disputes		
(a) Introduction	39.43	1536
(b) The threshold approach before 1925		
(i) The common law	39.49	1541
(ii) Section 5 of the 1886 Act	39.51	1543
(c) The position of discretion before 1925	39.59	1551
(d) The impact of the 1925 Act		

	Para.	Page
(i) Introduction	39.63	1554
(ii) Textual commentaries	39.67	1556
(iii) The positive approach	39/72	1561
(iv) The negative approach	39.77	1566
(v) Conclusion	39.87	1575

40 - THE CONTEMPORARY APPROACH TO WELFARE : THE STATUTORY JURISDICTIONS IN SCOTLAND

1. Introduction

(a) The Court of Session	40.1	1578
(b) The Sheriff Court	40.6	1582

2. The consistorial jurisdiction

(a) General	40.7	1583
(b) The traditional threshold approach	40.13	1587

(c) The contemporary approach

(i) The foundations	40.16	1589
(ii) The subsumptive approach	40.20	1592
(iii) The presumptive approach	40.23	1595

(d) Incidental matters

(i) General	40.29	1600
(ii) Third parties	40.31	1601
(iii) Fragmentation of the family	40.38	1607

	Para.	Page
3. The shrieval jurisdiction		
(a) Third party disputes	40.39	1608
(b) Parent and third party disputes	40.43	1611
(c) Inter-parental disputes	40.50	1618
(d) Questions of access	40.56	1623
4. Custody and aliment		
(a) Introduction : legitimate children	40.58	1625
(b) Illegitimate children		
(i) The common law	40.63	1629
(ii) The 1930 Act	40.68	1632
41 - THE CONTEMPORARY APPROACH IN ENGLAND : THE EQUITABLE AND MATRIMONIAL JURISDICTIONS		
1. Introduction		
(a) Comparative aspects	41.1	1638
(b) The significance of wardship	41.7	1642
(c) The care of orphans	41.12	1645
2. Equitable reform		
(a) General	41.19	1649
(b) The equitable approach	41.23	1654
(c) Modern wardship	41.33	1662
3. The matrimonial jurisdiction		
(a) The earlier authorities	41.42	1671

	Para.	Page
(b) The later authorities		
(i) W v W	41.50	1678
(ii) The threshold approach : access	41.55	1681
(iii) The balancing technique	41.57	1683
(iv) Judicial techniques of restriction	41.62	1687
(c) Conclusion : the current system	41.66	1690
42 - THE CONTEMPORARY APPROACH IN ENGLAND : THE GUARDIANSHIP LEGISLATION		
1. Introduction	42.1	1698
2. Inter-parental disputes		
(a) General	42.3	1699
(b) The approach of Megarry J.	42.8	1704
(c) Principles and considerations	42.12	1709
3. Parent - third party disputes		
(a) General	42.16	1713
(b) The decisions in Thain and Carroll	42.18	1715
(c) The evolution of the balancing approach	42.29	1726

43 - THE CONTEMPORARY APPROACH IN ENGLAND : THE ECLECTIC
APPROACH - THE HOUSE OF LORDS IN 1969

1. Introduction		
(a) General	43.1	1745
(b) The doctrine of precedent	43.4	1748
(c) Standards and structures	43.7	1750
2. The importance of the point of commencement	43.11	1753
3. The case of J v C		
(a) The trial judge	43.17	1756
(b) The approach of the House of Lords		
(i) General	43.19	1758
(ii) Lords Guest and MacDermott	43.21	1760
(iii) Lord Upjohn	43.26	1764
(iv) Conclusion	43.27	1765
4. The decision of the House of Lords	43.29	1766
5. Conclusion	43.39	1775

D - THE IMPLICATIONS OF THE WELFARE CONCEPT

PART 8 - SUBSTANTIVE IMPLICATIONS

44 - THE SUBSTANCE OF WELFARE

1. Introduction	44.1	1778
2. The meaning of welfare : Scotland		
(a) Custody and related issues		

	Para.	Page
(i) General aspects of welfare	44.9	1784
(ii) Religion	44.16	1789
(iii) Physical and moral integrity	44.22	1794
(b) Adoption	44.25	1797
3. The meaning of welfare : England		
(a) Custody and related issues		
(i) Introduction	44.27	1798
(ii) The general aspects of welfare	44.30	1801
(iii) The wishes of the child	44.38	1807
(iv) Religion	44.39	1808
(v) The specific aspects of welfare	44.42	1810
(b) Adoption	44.51	1816
4. Legal constraints in the substance of welfare		
(a) Introduction	44.56	1820
(b) Maintenance	44.60	1823
(c) Education	44.67	1828

PART 9 - ADJECTIVE IMPLICATIONS

45 - THE INCIDENTALS OF THE WELFARE DOCTRINE

1. Introduction	45.1	1833
2. Sources of knowledge		

	Para.	Page
(a) Introduction	45.4	1835
(b) Judicial relaxation of the rules of evidence	45.7	1837
(c) Techniques of investigation	45.11	1839
(d) Judicial knowledge	45.16	1843
(e) Specialist knowledge	45.20	1845
(f) Sources of knowledge : other contexts	45.27	1851
(g) Serological evidence	45.34	1857
3. Judicial powers		
(a) Jurisdictional powers	45.41	1863
(b) Substantive powers	45.45	1866
4. Questions of procedure and jurisdiction		
(a) Relaxation of procedures	45.59	;878
(b) Jurisdiction : restrictions	45.62	1881
(c) Welfare and juris- diction : creation	45.65	1883
(d) Foreign complications	45.69	1887

BIBLIOGRAPHY

TABLE OF STATUTES*

		<u>Para</u>
Regiam Majestatem, II.47		32.26
1540	Court of Wards (32 Hen. 8, c.46)	32.61
1601	Poor Relief (43 Eliz. 1, c.2)	44.64
1660	Tenures Abolition (12 Car. 2, c.24)	2.4, 32.41
1698	Blasphemy (9 & 10 Wm. 3, c.32)	34.4
1809	Concealment of Birth (Scotland) (49 Geo. 3, c.14)	12.9
1813	Doctrine of the Trinity (53 Geo. 3, c.160)	34.4
1830	Court of Session (11 Geo. 4 & 1 Wm. 4, c.69)	
	s.32	33.107
	s.33	33.76
	s.35	33.78
	s.36	45.9
	s.38	33.79
1836	Court of Session (6 & 7 Wm. 4, c.41)	
	s.1	33.79
	s.2	33.79
1839	Custody of Infants (2 & 3 Vict., c.54)	7.3, 33.1
		33.2, 34.1
		34.3, 34.29, 34.32
		35.2, 35.15, 36.1, 41.45, 43.27
	s.1	34.23, 34.27, 34.39, 34.42
	s.4	34.26, 34.27, 38.1, 38.5, 38.6, 40.11
1845	Poor Law (Scotland) (8 & 9 Vict., c.83)	
	s.80	44.60
1854	Reformatory Schools (Scotland) (17 & 18 Vict., c.74)	7.5, 15.2, 15.3
		15.4, 15.15
	s.14	15.6
1857	Industrial Schools (20 & 21 Vict., c.48)	7.5, 15.2-15.4
		15.15, 15.21
	s.13	15.17
	s.14	15.8, 15.17, 15.25
	s.15	15.7-15.9
	s.38	15.28

* Any reference in this Table to T followed by a number is a reference to the Table of that number in the text; otherwise the references are to paragraphs.

1857	Matrimonial Causes (20 & 21 Vict., c.85)	8.9, 34.1, 34.29 34.99, 34.100, 35.15 36.20, 41.7, 41.42, 41.45, 45.51
	s.2, s.6	34.92
	s.35	34.94, 34.97, 38.3, 38.6 41.46, 41.62, 45.43
	s.37	40.7
1859	Matrimonial Causes (22 & 23 Vict., c.61)	
	s.4	34.95
1861	Conjugal Rights (Scotland) Amendment (24 & 25 Vict., c.86)	33.75, 33.78 33.82, 33.83 33.90-33.94, 34.1 34.93, 34.94, 36.20, 39.2 39.48, 40.1, 41.42, 45.51
	s.9	5.32, 33.80, 33.81, 40.7, 40.12 45.43, T5
	s.13	33.79
1861	Offences against the Person (24 & 25 Vict., c.100)	
	s.27	12.5-12.7, 28.13, T1
	s.55	12.2
	s.56	12.2, 13.25, T1
	s.60	12.9
1868	Poor Law Amendment (31 & 32 Vict., c.122)	
	s.37	8.18
	s.80	11.2, 11.16
1870	Elementary Education (33 & 34 Vict., c.75)	44.68
1872	Education (Scotland) (35 & 36 Vict., c.62)	8.4
	s.70	8.5
1873	Custody of Infants (36 & 37 Vict., c.12)	33.1, 33.2, 34.1 34.3, 34.4, 34.29 34.34, 34.39, 34.81-34.85 35.2, 35.15, 36.1, 38.1, 43.27 34.70, 34.79, 34.80, 35.43, 36.18
	s.2	34.70, 34.79, 34.80, 35.43, 36.18
1873	Judicature (36 & 37 Vict., c.66)	32.3, 41.20, 41.21, 41.24
	s.25	34.29
1883	Education (Scotland) (46 & 47 Vict., c.56)	8.4
1884	Matrimonial Causes (47 & 48 Vict., c.68)	
	s.6	41.52
1885	Criminal Law Amendment (48 & 49 Vict., c.69)	
	s.2	T1
	s.4	T1
	s.5	T1
	s.6	T1
	s.7	13.22, T1

1886	Guardianship of Infants (49 & 50 Vict., c.27)	7.6, 8.27, 32.2, 33.1 34.1, 35.2, 35.5-35.7 35.37, 36.1, 37.1, 39.33 39.48, 39.49, 39.58, 40.1 40.9, 40.52, 40.68, 41.7 41.19, 41.46, 43.27
	s.2	35.7, 35.8, 35.21, 37.9, 37.46
	s.3	35.7, 35.8, 35.19, 35.21-35.26 35.31, 37.3, 37.38, 37.47
	s.5	8.14, 35.7, 35.14, 35.31, 35.36-35.44 36.4, 36.6, 38.22, 38.26, 38.49, 39.1 39.22, 39.43, 39.45, 39.49, 39.51 39.61, 40.2, 40.6, 40.48, 40.50, 40.51 40.56, 42.3, 42.17, 42.35, 42.45, 45.43 45.44, T3, T9
	s.6	35.7, 35.8, 35.19, 35.31, 35.34, 35.35 35.43, 37.28, 37.31, 37.45, 38.1, T4
	s.7	35.7, 35.8, 35.24, 35.27-35.30, 38.3 38.5, 38.8, 38.10-38.12
	s.8	36.9
	s.9	36.3, 38.22, 38.26, 39.2, 40.29
	s.10	38.26
1889	Prevention of Cruelty to and Protection of Children (52 & 53, Vict., c.44)	7.5, 11.4 11.2
1889	Interpretation (52 & 53 Vict., c.63)	
	s.19A	24.23
	s.32	5.48
1891	Custody of Children (54 & 55 Vict., c.3)	7.7, 14.3, 14.8 32.2, 33.1, 35.94 36.7, 37.7, 38.3, 38.5 38.13-38.15, 38.50-38.61, 39.1, 39.11 39.13, 39.15, 39.16, 39.23, 39.33 39.75, 39.87, 40.6, 40.9, 40.39 41.19, 41.24, 42.19, 43.27
	s.1	3.14, 5.2, 5.12, 21.13, 28.9, 28.14 35.54, 35.58-35.62, 35.65-35.71 38.16, 38.21, 38.49, 38.65, 44.2 T1, T4, T5
	s.2	35.58, 38.27, 38.30, 38.36 38.40, 38.49
	s.3	3.14, 4.10, 4.19, 4.20, 21.13, 28.9 28.14, 35.58-35.60, 35.63-35.71 38.21, 38.29, 38.36, 38.40, 38.65 44.2, T1, T3
	s.4	6.15, 44.17, 44.41, T8
	s.5	35.45, 35.58, 35.61, 38.17
	s.6	35.58
1894	Prevention of Cruelty to Children (57 & 58 Vict., c.41)	8.16, 11.14 8.18, 8.24 15.10
1904	Prevention of Cruelty to Children (4 Edw. 7, c.15)	11.4 8.18, 11.21
	s.1	

1907	Sheriff Courts (Scotland)	
	(7 Edw. 7, c.51)	40.6, 40.56, 45.44
	s.5	38.26
1908	Children (8 Edw. 7, c.67)	8.21, 11.4, 15.2, 18.11
	s.12	8.17, 11.11, 11.24
	s.38	11.36
	s.57	15.12
	s.58	15.12, 15.13, 15.16, 15.26
	s.102	8.25
	s.120	8.22, 12.8
1913	Sheriff Courts (Scotland)	
	(2 & 3 Geo. 5, c.28)	40.6, 40.56, 45.44
	s.3	38.26
1913	Mental Deficiency and Lunacy	
	(Scotland) (3 & 4 Geo. 5, c.38)	10.8
	s.7	8.29
	s.12	8.29
1921	Trusts (Scotland) (11 & 12 Geo. 5, c.58)	37.9
	s.4	37.21
	s.5	37.21
1925	Guardianship of Infants	
	(15 & 16 Geo. 5, c.45)	7.6, 7.8, 7.13, 8.8
		32.2, 33.1, 35.1, 36.1
		39.33, 39.46, 39.48, 39.87
		40.2, 40.16, 40.31, 40.56
		41.17, 41.19, 41.25, 41.33
	s.1	41.37, 41.46, 41.48, 41.52, 43.27
		1.30, 2.36, 5.41, 8.2, 16.12
		16.25, 17.12, 21.13, 25.58
		35.10, 35.77, 35.78-35.96, 36.3
		36.16, 36.36, 36.40, 36.47
		36.51, 37.49, 38.10, 38.14
		38.15, 38.62, 38.63, 39.1, 39.34
		39.44, 39.45, 39.59-39.86, 40.27
		40.46, 40.55, 41.3, 41.24, 41.34
		41.50, 41.41, 41.53, 41.54, 41.56
		41.57-41.63, 42.9, 42.10, 42.11
		42.14, 42.15, 42.18, 42.21, 42.24
		42.26, 42.35, 42.39, 42.40, 42.44
		42.46, 42.47, 43.1, 43.3, 43.6
		43.12, 43.26, 43.28, 43.31
		43.32-43.35, 43.38, 43.41, 44.14
		45.43, 45.79, T3
	s.2	35.77, 37.47
	s.3	35.77
	s.4	35.7, 35.21, 35.77, 35.80, 37.9
		37.46, 37.48, T5
	s.5	35.19, 35.24, 35.26, 35.77, 35.80
		37.38, T3, T5
	s.6	35.21, 35.31, 35.77, 35.80, T5
	s.7	35.77, 36.3, 39.2, 45.44, 45.66
	s.8	35.77
	s.9	35.77
	s.10	35.77, 36.9, 37.9, 38.26
	s.11	35.77, 36.9

1926	Adoption of Children (16 & 17 Geo. 5, c.29)	23.18
	s.2	23.8, 27.3, 28.1, 28.2, 29.2
	s.5	8.15
1928	Administration of Justice (18 & 19 Geo. 5, c.26)	40.56, 40.68, 42.46
	s.16	36.4, 38.26, 39.49
		40.6, 45.44
	s.20	36.4
1929	Local Government (Scotland) (19 & 20 Geo. 5, c.25)	
	s.14	38.38
1929	Infant Life (Preservation) (19 & 20 Geo. 5, c.34)	12.11
	s.1	T1
1930	Poor Law (20 & 21 Geo. 5, c.17)	
	s.52	14.15, 14.16
1930	Illegitimate Children (Scotland) (20 & 21 Geo. 5, c.33)	35.2, 38.19, 39.34
		40.6, 40.59
		40.68-40.74, 44.60
	s.2	4.10, 26.21, 27.23, 36.5
		36.8, 39.22, 39.27, 39.30
		39.45, 40.48, 40.49, 45.44, T3
1930	Adoption of Children (Scotland) (20 & 21 Geo. 5, c.37)	23.18
-	s.1	8.28, 23.14, 23.16, 23.19
	s.2	8.30, 23.8, 27.20
	s.3	25.35, 27.20, 28.1, 28.2
	s.5	26.11
	s.10	23.16, 23.17, 23.19, 23.20-23.33
1932	Children and Young Persons (22 & 23 Geo. 5, c.46)	
	s.79	36.7
1932	Children and Young Persons (Scotland) (22 & 23 Geo. 5, c.47)	
	s.73	36.7
1933	Children and Young Persons (23 & 24 Geo. 5, c.12)	1.21, 7.5, 13.3, 15.2
		15.3, 22.16, 45.27
	s.1	3.10, 3.11, 3.13, 6.19, 10.5
		10.6, 11.3, 11.5, 11.7
		11.13-11.18, 11.26, 11.27, 11.38
		12.1, 12.5, 12.7, 13.1, 13.6
		14.18, 15.21, 15.31, 18.3, 20.34
		28.9, 28.13, 38.20, 40.58, T1, T9
	s.3	T1
	s.4	T1
	s.5	T1
	s.7	T1
	s.10	T7
	s.11	T1
	s.17	11.32, 11.34, 11.35, 12.7
	s.18	T1
	s.20	T1

s.23		T1
s.24		T4
s.25	3.29,	T2
s.31		T6
s.34	6.22, 15.59,	T9
s.36		T6
s.37		T6
s.39		T6
s.40	5.30, 5.31, 19.12, 21.9, 21.10,	T4
s.43		T6
s.44	3.24, 4.10, 5.45, 15.16, 17.19 18.22-18.26, 21.20, 21.24	
s.47		T6
s.49		T6
s.55	17.23, 17.24, 17.27, 17.28 17.29, 17.57	
s.61	15.44, 15.54, 15.58	
s.62	15.18, 17.38, 21.10	
s.67	21.9, 21.10	
s.75		17.32
s.107		17.28
1936	Public Health (26 Geo. 5 & 1 Edw. 8, c.49)	14.22
1937	Children and Young Persons (Scotland) (1 Edw. 8 & 1 Geo. 6, c.37)	
s.12	7.5, 15.2 8.21, 11.3, 11.9 11.10, 11.22, 11.23, 13.6 14.8, 20.34, 38.20, 40.58	
s.13		T1, T9
s.14		T1
s.15		T1
s.16		T1
s.18		T1
s.20		T1
s.21		T1
s.22		T7
s.28		T1
s.30		T1
s.33		T1
s.34		T1
s.39		T4
s.40		T6
s.42		T3
s.44		T9
s.45		T6
s.46		T6
s.47		T6
s.49	5.45, 5.46, 15.14, T2,	T4
s.52		T3
s.54		T6
s.57		T6
s.66		19.32
s.79	17.18, 17.33-17.35	
s.80	17.32, 17.33-17.35 17.18	

1938	Infanticide (1 & 2 Geo. 6, c.36)	12.11
1939	Custody of Children (Scotland)	
	(2 & 3 Geo. 6, c.4)	35.2
	s.1	33.80, 36.10, 36.11
1939	Limitation (2 & 3 Geo. 6, c.21)	
	s.22	41.1
1944	Guardianship (Refugee Children)	
	(7 & 8 Geo. 6, c.8)	14.16
	s.1	T5, T9
	s.2	T5, T9
1944	Education (7 & 8 Geo. 6, c.31)	
	s.8	6.9, 44.68, T2, T7
	s.33	T2
	s.34	T2
	s.36	3.25, 3.29, 6.9, 6.10, 44.68, T2, T7
	s.37	T9
	s.38	T9
	s.39	6.10, 6.15, T1, T8
	s.54	T1, T2
	s.59	5.13, T3, T4
	s.76	6.9
1945	Family Allowance (8 & 9 Geo. 6, (c.41)	14.22
1946	National Health Service (9 & 10 Geo. 6, c.81)	
	s.22	T2
1947	National Health Service (Scotland) (10 & 11 Geo. 6, c.27)	
	s.22	T2
1948	National Assistance (11 & 12 Geo. 6, c.29)	
	s.42	44.64
	s.51	11.16, 11.20, 44.60, T1
1948	Children (11 & 12 Geo. 6, c.43)	1.21, 7.11
		14.2, 14.3, 35.84
		36.29, 37.7, 38.30, 43.2
	s.1	3.13, 3.14, 3.19, 4.8, 6.17
		6.19, 14.4, 14.5, 14.17
		14.25-14.27, 16.1-16.6, 16.8
		16.12, 16.13, 16.20-16.22
		16.28, 16.29, 17.1, 17.3
		17.4, 17.38, 19.4, 20.33
		20.36, 20.37, 20.43, 36.30
		38.1, T1, T2, T3, T8, T9
	s.2	5.12, 14.6, 14.8, 14.15, 14.18
		14.15, 14.18, 14.19, 14.25 - 14.27
		16.2, 17.3-17.5, 17.17, 17.38
		18.16, 20.36, 20.37, 20.39, 20.43
		T1, T3, T4, T9
	s.3	17.39, 17.40, 17.51, 17.61, T8
	s.4	17.5, 17.6, 17.10, 18.16, T4
	s.4B	20.52, 45.61
	s.11	17.20
	s.12	1.30, 3.24, 4.4, 4.5, 6.20, 16.16
		16.17, 17.15, 21.19, 36.31
		36.37, T3, T9

	s.13	3.22, 14.21, 16.11, 17.27 17.28, 20.10, 21.22, 36.31 36.37, T2
	s.14	T10
	s.17	4.19, 6.24, 45.57, T3, T9
	s.18	T8
	s.23	44.63
	s.24	44.63
	s.31	6.30, T10
	s.33	T10
	s.34	T3
	s.41	6.30
	s.54	T3
	s.59	16.14, 17.28
1948	Nurseries and Child-Minders Regulation (11 & 12 Geo. 6, c.53)	
	s.1	3.26, T2, T3
1948	Criminal Justice (11 & 12 Geo. 6, c.58)	
	s.3	5.16, 5.18, 19.35, T4, T5
	s.7	5.16, 5.18, 19.35, T4, T5
	s.11	19.35
	s.17	3.29, 4.21, 19.40, 19.42 T2, T3, T6
	s.20	19.37, T5
	s.46	T10
1949	Criminal Justice (Scotland) (12, 13 & 14 Geo. 6, c.94)	
	s.1	T4, T5
	s.2	T4, T5
	s.12	T10
	s.18	T2, T3, T6
	s.20	T5
	s.53	T10
1949	Adoption (12, 13 & 14 Geo. 6, c.98)	
	s.2	29.20
	s.3	28.7
1949	Law Reform (Miscellaneous Provisions) (12, 13 & 14 Geo. 6, c.100)	42.29
	s.2	45.79
	s.9	41.8, 45.65
1950	Matrimonial Causes (14 Geo. 6, c.25)	
	s.26	8.10
1950	Adoption (14 Geo. 6, c.26)	9.5-9.11 10.2, 10.3
	s.1	23.18, 26.14
	s.2	23.9, 24.2, 26.14, 27.3
	s.3	28.1, 28.2, 28.10, 28.17, 29.3
	s.5	25.39, 25.42
1951	Guardianship and Maintenance of Infants (14 & 15 Geo. 6, c.56)	
	s.1	36.3, 39.2
1952	Prisons (15 & 16 Geo. 6 & 1 Eliz. 2, c.2)	
	s.44	T4
	s.47	T10

1952	Magistrates Courts (15 & 16 Geo. 6 & 1 Eliz. 2, c.55)	
	s.57	T6
	s.58	T6
1952	Prisons (Scotland) (15 & 16 Geo. 6 & 1 Eliz. 2, c.61)	
	s.32	5.24, T4
1954	Law Reform (Limitation of Actions etc.) (2 & 3 Eliz. 2, c.36)	41.1
1955	Children and Young Persons (Harmful Publications) (3 & 4 Eliz. 2, c.28)	
	s.2	T1
	s.4	T1
1956	Sexual Offences (4 & 5 Eliz. 2, c.69)	
	s.5	T1
	s.6	T1
	s.18	12.2
	s.19	12.2, 12.4, T1
	s.20	12.2, 13.6, T1
	s.23	T1
	s.25	T1
	s.26	T1
	s.28	T1
1957	Affiliation Proceedings (5 & 6 Eliz. 2, c.55)	
-	s.5	T5
	s.11	T1
1958	Adoption (7 & 8 Eliz. 2, c.5)	9.11, 22.1
		22.4-22.10, 24.1
	s.1	23.5, 23.14, 25.20, 26.14
		26.31, 26.56, 31.2, 31.3
	s.2	23.5, 23.6, 23.10-23.14
		31.14, 31.15
	s.3	24.2, 24.3, 24.7, 24.23, 44.55
	s.4	5.28, 26.6, 27.3, 27.7, 27.12
		27.32-27.34, 29.23, 31.13
	s.5	25.2, 25.20, 27.7, 28.2, 28.12
		28.15, 28.18, 28.20, 28.25, 28.30
		29.3, 29.11, 29.31, 30.54, 31.2
		31.3
	s.6	27.8
	s.7	3.25, 5.40, 24.12, 25.1, 25.2
		25.3, 25.6, 25.70, 25.21
		25.28-25.36, 25.46, 25.47
		25.50, 25.53, 25.58, 25.59
		26.1-26.3, 26.7, 26.31, 26.39
		26.42, 26.43, 26.50, 26.59
		26.60, 27.8, 27.14, 28.23, 30.3
		30.9, 30.13, 31.2, 31.3, 31.13
		31.18, 31.25, 31.26, 42.45
		44.8, 44.51
	s.8	5.37, 17.45, 17.46, 27.1
		27.34, 31.3
	s.9	45.30

	s.11	45.29
	s.13	30.46, 39.41
	s.26	31.3
	s.29	45.29
	s.34	4.10, 45.30
	s.34A	29.22, 45.30
	s.37	5.13
	s.38	5.40, T2, T3
	s.41	5.28, T4
	s.43	3.14, T4
	s.53	24.22, 26.7
	s.57	23.15
1958	Matrimonial Proceedings (Children) (6 & 7 Eliz. 2, c.40)	8.2, 36.12
		36.20, 39.48, 40.1, 45.6
	s.1	36.32, 45.44
	s.2	36.20, 36.24-36.26, 45.63
	s.3	36.32, 45.44
	s.5	36.31, 45.51, 45.53
	s.6	36.32, 45.53
	s.7	36.32, 40.5, 45.44
	s.8	4.17, 5.40, 36.20, 36.24-36.26
		40.2, 40.9, 40.12, 45.62
		45.79, T3
	s.9	36.32, 40.5, 45.44
	s.10	5.32, 5.33, 5.35, 36.31
		36.34, 45.51, 45.53
	s.11	36.21, 45.14, 45.21
	s.12	5.32, 5.34, 5.35, 36.34, 45.53
	s.13	36.32
	s.14	8.26, 10.10, 33.80, 40.29
1958	Children (6 & 7 Eliz. 2, c.65)	7.11, 9.3, 14.21
	s.1	4.7, 5.40, T2, T3
	s.1A	4.7, 5.40, T2, T3
	s.2	2.12
	s.4	5.28, T2, T4
	s.7	T4
	s.12	5.41
1959	Licensing (Scotland) (7 & 8 Eliz. 2, c.51)	
	s.143	12.8, T1
	s.144	T1
	s.145	T1
1959	Legitimacy (7 & 8 Eliz. 2, c.73)	42.28
	s.3	36.6, 42.35, 45.44
1960	Indecency with Children (8 & 9 Eliz. 2, c.33)	7.12
1960	Matrimonial Proceedings (Magistrates Courts) (8 & 9 Eliz. 2, c.48)	7.12, 8.12
		8.13, 9.2
	s.1	5.39
	s.2	5.35, 5.39, 36.33, 39.2, 44.65
		45.44, 45.51, 45.53, 45.56, T5
	s.3	5.41
	s.4	T5
	s.9	40.5
	s.14	40.5

1960	Adoption (8 & 9 Eliz. 2, c.59)	22.1
1961	Criminal Justice (9 & 10 Eliz. 2, c.39)	
	s.1	19.35, 19.37
1962	Education (Scotland) (10 & 11 Eliz. 2, c.47)	
	s.1	T2, T7
	s.5	T2
	s.17	T3
	s.29	T7
	s.31	T2, T7
	s.35	T1
	s.61	T1, T2
	s.63	T2
	s.137	5.13, T4
1963	Betting, Gaming and Lotteries (1963 c.2)	
	s.21	T1
	s.22	T1
1963	Weights and Measures (1963 c.31)	12.1
1963	Children and Young Persons (1963 c.37)	1.21, 7.5, 15.2, 15.41
	s.1	4.4, 5.43, 19.3, T3
	s.2	15.18, 15.58
	s.3	3.23, T2
	s.16	19.23
	s.27	T6
	s.37	3.26, T2
	s.41	T4
	s.58	T2
1964	Licensing (1964 c.26)	
	s.128	12.8
	s.168	T1
	s.169	T1
	s.170	T1
1964	Succession (Scotland) (1964 c.41)	26.21
1964	Adoption (1964 c.57)	22.1
1965	Dangerous Drugs (1965 c.15)	12.1
1965	Firearms (1965 c.44)	12.1
1965	Matrimonial Causes (1965 c.72)	10.3
	s.45	35.27
1965	Race Relations (1965 c.93)	12.1
1966	Ministry of Social Security (1966 c.20)	
	s.22	44.64
	s.30	11.16, 11.20, 44.60, T1
1966	Law Reform (Miscellaneous Provisions) (Scotland) (1966 c.19)	
	s.4	8.30, 27.36
	s.8	33.80
1967	Criminal Justice (1967 c.80)	9.4
1967	Abortion (1967 c.87)	
	s.1	12.13-12.16, T1
	s.2	12.13-12.16, T1
1968	Social Work (Scotland) (1968 c.49)	1.21, 7.5, 14.2, 14.3

	15.2, 15.3, 15.29, 18.8, 18.13
	20.1, 22.9, 22.17, 35.84
	37.7, 38.30
s.1	14.5
s.3	45.27
s.5	6.30, T10
s.12	4.6, 5.43, 19.3, T3
s.15	3.14, 14.4, 16.1, 16.23, 16.26
	17.1, 17.3, 17.4, 20.36, 20.37
	36.30, 38.1, T1, T2, T3, T8, T9
s.16	5.12, 5.26, 14.6, 14.8, 14.9
	17.1, 17.3, 17.4, 17.5, 18.16
	20.36, 20.37, 20.39, T1, T3, T4, T9
s.17	5.26, T4, T8
s.18	5.27, 17.5, 18.16, T4
s.18A	45.61
s.20	1.30, 5.41, 16.16, 16.17, 17.15
	36.31, 36.37, 45.53, T3
s.21	14.21, 16.11, 36.31, 45.53, T2
s.23	45.57, T3, T9
s.31	5.45, 5.46, 19.27-19.29, T6
s.32	3.14, 5.10-5.12, 15.4, 15.23
	15.24, 15.35, 15.39, 16.5, 19.18
	20.33, 38.1, 44.8, T1
s.34	T6
s.34A	20.52, 45.6, 45.61
s.35	T6, T10
s.36	T10
s.37	5.25, 15.19, 18.1, 18.10
	19.5, 19.18, 19.20, 20.32, T4
s.38	18.1, 18.10, 19.5, 19.19, 45.27
s.39	18.1, 18.10, 19.21, 45.27
s.40	T4, T6
s.41	6.22, 15.59, T9
s.42	5.46, 18.1, 18.27
	18.38, 18.40-18.44
s.43	5.44, 18.27, 18.30-18.36
	18.39, 18.40-18.44, 18.49
	19.10, 19.19, T3
s.44	4.12, 5.24, 6.24, 17.18
	18.1, 18.20, 18.27, 18.40-18.44
	18.49, 20.14, T4, T8, T9
s.47	T3
s.48	5.49, 20.8
s.49	18.30
s.52	4.9, T3
s.54	4.12
s.58	T6
s.60	6.30, T10
s.62	T4
s.68	T3
s.90	5.48
s.95	5.46
1968 Adoption (1968 c.53)	22.1
1968 Legitimation (Scotland) (1968 c.22)	
s.6	26.25

1969	Tattooing of Minors (1969 c.24)	
	s.1	T1
1969	Age of Majority (Scotland) (1969 c.39)	
	s.1	36.11
	s.12	36.11
1969	Family Law Reform (1969 c.46)	26.21
	s.1	36.11
	s.6	44.65
	s.7	5.41, 36.33, 45.51, 45.53
	s.20	45.37
1969	Children and Young Persons (1969 c.54)	1.21
		7.10, 9.4
		14.2, 15.2, 15.3, 18.13
		20.1, 22.9, 35.84
	s.1	3.14, 3.23, 5.10-5.12, 5.39
		5.41, 5.46, 6.10, 15.4, 15.16
		15.18, 15.21, 15.24, 15.33, 15.39
		15.49-15.51, 16.5, 17.1, 17.18
		18.1, 18.3, 18.18, 18.19, 19.5
		20.5, 21.11, 21.25, 38.1, 44.8
		45.27, T1, T4, T7
	s.2	4.16, 5.39, 6.22, 18.10, 18.18
		19.5, 19.6, 45.27, T3, T9
	s.4	19.23
	s.6	T6
	s.8	18.10, T6
	s.9	19.16, T2
	s.11	17.19, 21.11
	s.12	T2
	s.14	T2
	s.15	5.48, 5.49, 19.11
	s.17	19.11
	s.18	T9
	s.20	17.19, 19.11
	s.21	5.49, 19.11, 21.11, 21.17
		21.19, 21.27, 21.29, T4
	s.23	5.41
	s.24	17.19, 17.22, 17.28, 17.31
		17.61, T2, T8
	s.27	4 5, 6.12, 18.17
	s.28	4.16, 19.13, 19.14, 20.32
		T3, T4, T9
	s.29	4.16, 19.14
	s.31	T4
	s.32A	20.52
	s.32B	20.52, 45.6, 45.61
	s.36	T2
	s.37	T2
	s.43	6.30, T10
	s.61	T10
	s.70	15.23, 44.5
	s.73	17.29
	s.107	19.12
1969	Divorce Reform (1969 c.55)	41.67
1970	Matrimonial Proceedings and Property (1970 c.45)	9.2

	s.17	45.64, T3
	s.27	8.11
1971	Guardianship of Minors (1971 c.3)	7.8, 7.13
		35.1, 35.2, 42.1
	s.1	1.30, 3.24, 4.12, 5.47, 35.10
		35.78, 36.3, 36.14, 38.14
		38.15, T3
	s.3	35.7, 35.21, 35.80, 37.38
	s.4	35.19, 35.24, 35.26, 35.80, T5
	s.5	T5
	s.6	5.28, 35.7, 35.19, 37.28, 38.1, T4
	s.7	35.21, 35.31, 37.47, T5
	s.9	4.10, 6.24, 35.31, 44.65
		45.56, T3, T9
	s.10	4.10, T3
	s.11	4.10, 36.7, T3
	s.14	26.21, 27.23, 36.6
	s.15	36.3
1973	Matrimonial Causes (1973 c.18)	35.1, 36.12
	s.1	36.13-36.18, 41.67
	s.4	44.5
	s.9	36.16
	s.10	36.13-36.19
	s.18	38.7
	s.25	44.65
	s.41	36.22, 36.24-36.26, 36.32, 45.62
	s.42	35.24, 36.32, 39.2, T5
	s.43	5.35, 5.41, 36.31, 45.51, 45.53
	s.44	5.35, 36.32, 45.53
	s.52	8.10
1973	Guardianship (1973 c.29)	2.31, 7.13, 35.2
		36.11, 37.40, 39.1
		41.10, 41.38, 41.41, 45.27
	s.1	4.6, 6.21, 17.56, 35.10, 35.78
		36.7, 36.12, 39.14, 40.60
		41.32, 41.40, T3, T4, T9
	s.2	36.33, 45.51, T5
	s.6	45.21
	s.9	34.70, 35.77
	s.10	33.60, 35.10, 35.77, 35.78
		36.7, 36.12, 37.22, 39.14, 35.95
		39.64, 39.88, 40.60, 41.32
		T3, T4, T9
	s.11	36.34, 45.51, 45.53, T5
	s.12	45.21, 45.22
1973	Domicile and Matrimonial Proceedings (1973 c.45)	
	s.10	45.67
1975	Children (1975 c.72)	2.3, 7.9, 7.14, 14.8
		15.2, 22.1-22.3, 22.11-22.20
		24.1, 35.2, 37.7, 39.1
	s.3	1.30, 4.14, 23.3, 25.3, 25.5
		25.6, 25.8, 25.12, 26.3, 26.31
		26.43, 26.52, 26.61, 29.4, 29.9
		29.13, 29.27, 29.62, 30.40, 30.46

	30.56, 30.68, 30.71-30.75
	30.80, 30.82, 31.13, 31.30
	35.85, 35.87, 44.51, 45.29, T3
s.4	45.29
s.8	5.37, 8.30, 26.50, 26.56, 31.2
	31.3, 31.14, 31.18, 31.28, 39.41, T5
s.9	9.6, 24.23-24.27, 26.15, 44.55
s.10	23.5, 23.6, 23.11, 23.14, 26.14
	26.31, T1
s.11	23.5, 23.6, 23.11, 23.12, 26.15
	26.17, 31.14, T1
s.12	3.14, 3.18, 3.19, 5.31, 6.21
	25.2, 27.3, 27.6, 27.12-27.14
	27.32, 27.33, 28.1-28.3, 28.16
	29.3, 29.12, 29.31, 31.2, 31.3
	38.1, 44.51, T1, T4, T5, T9
s.13	26.6, 31.13, 44.41, T8
s.14	25.2, 27.13, 27.19
s.16	27.15
s.18	27.6
s.19	31.3, T5
s.20	27.15, 45.30, 45.61, T6, T10
s.21	T6
s.25	31.3
s.29	31.3
s.33	36.38, 36.40, 36.41, 36.43
	45.51, 45.54
s.35	36.41
s.36	36.39, 36.42, 36.52, 36.59, 39.1
s.37	26.19, 26.31, 26.44, 36.53
	39.1, 45.52, 45.54
s.39	45.22
s.47	36.38, 36.43, 36.45-36.51, 37.14
	37.16, 45.48, 45.50, 45.54
s.48	36.43, 36.52
s.49	45.21
s.53	26.19, 26.31, 26.44, 36.53-36.59
	39.1, 45.54
s.58	45.61
s.59	1.30, 5.41, 25.13
s.64	6.23, 45.6, 45.61, T6
s.66	6.23, 45.6, 45.61, T6
s.79	1.30, 5.41, 25.13
s.85	28.18, 36.41, 40.35, 41.1
s.86	36.40, 40.35
s.87	40.35, 41.1
s.89	28.18
s.100	23.5
s.107	23.15, 24.23, 27.23, 27.25
	36.40, 40.37
s.108	23.11, 23.15, 25.6, 31.13, 31.14
	39.41, 40.35, 44.8, 45.51
1975 Criminal Procedure (Scotland)	
(1975 c.21)	
s.14	20.32
s.323	20.32

1976	Adoption (1976 c.36)	5.40, 9.11, 22.1
		22.11-22.20, 24.1, 26.22
	s.3	45.29
	s.6	1.30, 4.14, 23.3, 25.3, 26.3
		26.6, 29.4, 29.13, 29.27, 30.40
		30.46, 44.51, 45.29, T3
	s.7	44.41, T8
	s.12	23.15, 26.50, T5
	s.13	24.23-24.27, 26.14, 44.55
	s.14	23.5, 23.6, 23.11, 26.14, 26.31, T1
	s.15	23.5, 23.6, 23.11, 23.14, 26.14, T1
	s.16	14.18, 27.3, 27.13, 27.32, 27.33
		28.1-28.3, 29.3, 44.51
		T1, T4, T5, T9
	s.18	27.13, 27.19
	s.20	27.15
	s.25	T5
	s.32	5.13
	s.33	T2, T3
	s.62	23.5
	s.64	T6
	s.65	27.15, 45.30, 45.61, T6, T10
	s.72	23.15, 27.23
	s.94	24.23
1976	Divorce (Scotland) (1976 c.39)	
-	s.1	40.12

TABLE OF STATUTORY INSTRUMENTS*

1925	Guardianship of Infants (Summary Jurisdiction) Rules (S.R. & O. 1925 No. 960)	
	r.3	5.14, T4
	r.4	5.14, T4
1933	Approved School Rules (S.R. & O. 1933 No. 774)	
	r.10	3.22, T2, T3, T7
	r.23	T1
	r.24	T1
	r.26	T7
	r.28	T1
	r.29	6.17, T8
	r.30	T1
	r.34	T1
	r.36	T1
	r.44	T1, T2
	r.45	T1, T2
1936	County Court Rules (S.R. & O. 1936 No. 626)	
	r.1	T6
1939	Remand Home Rules (S.R. & O. 1939 No. 12)	
	r.3	T1
	r.4	T1
	r.5	T1
	r.6	T1
	r.7	T1
	r.8	T1
	r.10	T7
	r.12	T8
	r.15	T1
	r.16	T1
	r.19	T , T9
1949	Approved Probation Hostel and Homes Rules (S.I. 1949 No. 1376)	
	r.6	4.8, T2, T3, T7
	r.17	T1
	r.18	T1
	r.19	T7
	r.22	T8
	r.23	T1
	r.28	T1
	r.29	T2
	r.30	T2

* Any reference in this Table to T followed by a number is a reference to the Table of that number in the text; otherwise the references are to paragraphs.

1950 Borstal (Scotland) Rules
(S.I. 1950, No. 1944)

r.4	3.28, T2
r.10	T1
r.11	T1
r.38	6.21, T9
r.42	T1
r.45	T7
r.47	T8
r.49	T8
r.50	T8
r.51	T8
r.54	T7
r.57	4.8, T3
r.66	T1, T2
r.76	T1, T2
r.80	T1
r.81	T1
r.82	T2
r.83	T1
r.87	T1

1951 Administration of Children's
Homes Regulations (S.I. 1951
No. 1217)

r.1	4.8, T3
r.2	T3
r.4	T8
r.5	T1, T2
r.6	T1, T2
r.9	T2
r.11	T1

1952 Detention Centre Rules
(S.I. 1952 No. 1432)

r.5	T1, T2
r.6	T3
r.7	T1
r.12	T1
r.25	T1
r.41	T1
r.45	T7
r.46	T1
r.48	T8
r.49	T8
r.50	T8
r.52	T8
r.57	4.8, T3
r.58	T2
r.67	T1, T2
r.68	T2
r.76	T1, T2
r.77	T1
r.78	T1
r.79	T1

1952	Prison (Scotland) Rules (S.I. 1952 No. 565)	
	r.32	5.18
	r.151	3.28, T2
	r.152	4.8, T3
1955	Boarding-out of Children Regulations (S.I. 1955 No. 1377)	21.30
	r.2	T1
	r.4	T3
	r.5	T4
	r.6	T1, T2
	r.7	T1
	r.8	T1, T2
	r.9	T3
	r.11	T8
	r.17	4.18, T2, T3, T8
	r.19	6.17, T8
	r.21	T3
	r.22	T3
	r.25	4.18, T3
	r.27	T8
1959	Adoption (County Court) Rules (S.I. 1959 No. 480)	
	r.2	27.32
1959	Act of Sederunt (Adoption of Children)	27.37
1959	Administration of Children's Homes (Scotland) Regulations (S.I. 1959 No. 834)	
	r.1	T3
	r.2	T3
	r.5	T8
	r.6	T1, T2
	r.7	T1, T2
	r.9	T2
	r.11	T1
1959	Boarding-out of Children (Scotland) Regulations (S.I. 1959 No. 835)	
	r.2	T1, T2
	r.3	T1
	r.4	T8
	r.5	T2
	r.11	T8
	r.12	T1, T2
	r.16	T3
	r.17	T8
1960	Detention Centre (Scotland) Rules (S.I. 1960 No. 870)	
	r.5	T1, T2
	r.6	T3
	r.7	T1
	r.12	T1
	r.37	T1
	r.41	T7
	r.42	T1

	r.44	T8
	r.45	T8
	r.46	T8
	r.47	T8
	r.56	T3
	r.63	T2
	r.76	T1, T2
	r.77	T1
	r.78	T1
	r.79	T1
	r.83	T1
1964	Borstal Rules (S.I. 1964 No. 387)	18.38
	r.1	T2
	r.11	T1
	r.12	T8
	r.13	T8
	r.15	T8
	r.18	T8
	r.19	T1, T2
	r.23	T1
	r.24	T1
	r.25	T1
	r.26	T1
	r.27	T1
	r.28	T2
	r.29	T7
	r.30	T7
	r.32	T3
	r.35	6.24, T3, T9
	r.42	5.17, T4
	r.45	T2, T9
	r.75	T2
	r.76	T1
1965	Probation Rules (S.I. 1965 No. 723)	
	r.36	4.8, T2, T3
1965	Rules of the Supreme Court	
	ord. 90.7	T6
1968	Children (Performances) Regulations (S.I. 1968 No. 1728)	
	r.2	T2
	r.6	T1
	r.8	T1
	r.10	6.11, T7
	r.12	T2
	r.13	T1
	r.14	T2
	r.15	T2
	r.16	T1
	r.17	T2
	r.21	T1
	r.22	T1
	r.23	T1
1970	Magistrates' Courts (Children and Young Persons) Rules (S.I. 1970 No. 1792)	
	r.5	6.22, T9

	r.6		T6
	r.8		T6
	r.10	4.8, 5.14, T3, T4, T6, T9	T9
	r.11		T6, T9
	r.14		T9
	r.16		T6
	r.17	6.22, T9	T9
	r.18	T4, T5, T6	T6
	r.20	4.8, 5.14, T3, T4, T6, T9	T9
	r.21		T6, T9
1971	Act of Sederunt (Social Work) (Sheriff Court Procedure Rules) (S.I. 1971 No. 92)		6.22
	r.6		T6, T9
	r.8	5.14, T4, T5, T6, T9	T9
1971	Children's Hearings (Scotland) Rules (S.I. 1971 No. 492)		6.22
	r.7		T6
	r.9		T5
	r.11	5.14, 20.53, T4	T4
	r.17		T3, T6
	r.19		T3
1971	Reporter's Duties and Transmission of Information etc (Scotland) Rules (S.I. 1971 No. 525)		6.22
	r.4		T4
1976	Adoption (Country Court) Rules (S.I. 1976 No. 1644)		45.30
1976	Adoption (High Court) Rules (S.I. 1976 No. 1645)		45.30
1976	Magistrates' Courts (Adoption) Rules (S.I. 1976 No. 1768)		45.30
1976	Adoption Agencies Regulations (S.I. 1976 No. 1796)		45.30

TABLE OF CASES1. SCOTLAND

A	Para.
A, Petitioner 1936 S.C. 255	27.39, 27.41
A, Mr and Mrs 1953 S.L.T. (Sh. Ct.) 45	9.8, 24.16, 24.17, 27.41
A, Petitioners 1958 S.L.T. (Sh. Ct.) 61	9.4-9.8, 9.14, 10.5, 24.4 24.11, 24.12, 25.41, 26.27
A and B, Petitioners 1932 S.L.T. (Sh. Ct.) 37	26.22, 26.23, 26.29
A and B, Petitioners 1971 S.L.T. 130	30.33, 30.34, 30.36, 45.33
A and B, Petitioners 1971 S.L.T. 258	29.15, 30.31-30.33, 30.37- 30.47, 30.72, 30.79, 44.26, 45.33
A v B (1553) Mor. 16224	32.32
A v B (1870) 42 Sc. Jur. 224	33.55, 33.57, 33.64, 33.70, 44.15
A v B (1888) 6 Sh. Ct. Rep. 6	40.50
A v B (1893) 9 Sh. Ct. Rep. 239	40.66
A v B (1895) 3 S.L.T. 4	40.65
A v B (1924) 41 Sh. Ct. Rep. 157	40.53
A v B 1955 S.C. 378	27.23-27.26, 29.34
A v N 1973 S.L.T. (Sh. Ct.) 34	38.19, 44.12, 44.23
Aberbrothok (Abbot of) v Forbes (1532) Mor. 16220	32.32
Abinet v Fleck (1894) 2 S.L.T. 30	13.22
Achans v Livingston (1542) Mor. 16220	32.32
Aitken v Gourlay & McNab (1903) 5 F.585	39.50
Alexander v McGarrity (1903) 5 F. 654	37.5, 44.17, 44.23
Allan v Allan 1919 2 S.L.T. 88	40.13, 40.14, 40.15
Allan, Petitioner (1895) 3 S.L.T. 87	37.13, 37.24, 37.25
Allen v Allen's Trustees (1869) 41 Sc. Jur. 617	33.15
Ames v Brown (1924) 40 Sh. Ct. Rep. 275	44.60
Anderson v Anderson (1922) 39 Sh. Ct. Rep. 158	38.28
Atherstone's Trustees, Petitioners (1896) 24 R. 39	37.5
Auld v Ayr C.C. (1960) 76 Sh. Ct. Rep. 38	44.70
B	Para.
B and B, Spouses 1936 S.C. 256	23.8, 23.9, 26.12, 26.14, 44.26
B and B, Petitioners 1946 S.L.T. (Sh. Ct.) 36	27.18, 27.20, 27.29
B and B, Spouses, Petitioners, 1965 S.C. 44	27.36, 27.38
B(A), Petitioner (1847) 10 D.229	33.48, 33.58
B(Mrs), Petitioner 1952 S.L.T. (Sh. Ct.) 48	26.55, 26.56, 44.26
B(A, Mr and Mrs) (1954) 71 Sh. Ct. Rep. 14	24.14
B(A), Petitioners 1959 S.L.T. (Sh. Ct.) 49	28.15, 28.17
B(A), Petitioners (1962) 78 Sh. Ct. Rep. 148	26.35, 26.36, 26.45, 44.26

B(A), Petitioner 1976 S.L.T. (Sh. Ct.) 49		30.68
B(R, Mr and Mrs) 1950 S.L.T. (Sh. Ct.) 73	23.19, 23.22,	23.26
		23.31
B(T, Mr and Mrs) 1950 S.L.T. (Sh. Ct.) 74		23.18
B(A) and B(C) 1961 S.C. 347		8.2
B v B 1907 S.C. 1186	40.5,	44.23
B(A) v B(A) (1950) 66 Sh. Ct. Rep. 225	40.57,	44.23
B(A) v D(C) (1850) 12 D. 1297	33.104,	33.105
B(A) and B(C) v X's Curator 1963		
S.C. 124	29.2, 29.27, 29.36,	29 49
	29.52-29.53, 29.59,	30.2
	30.31,	30.48
Babington v Babington 1955 S.C. 115		45.67
Baillie v Agnew (1775) 5 Brown's Supp.526	32.14, 32.15,	33.43
	33.94, 44.23,	44.67
		40.8
Bain v Douglas 1936 S.L.T. 418		
Balfour Melville, Petitioner (1903) 5 F.		
347	37.10, 37.13, 37.22, 37.24,	37.31
Balfour v Fairweather (1906) 22 Sh. Ct. Rep. 231	40.66,	40.67
Bannon v Dunbarton C.C. (1934) 50 Sh. Ct. Rep. 307		44.70
Barkworth v Barkworth 1913 S.C. 759	45.67,	45.70
Barr v Barr 1950 S.L.T. (Notes)		
15	40.11, 40.24, 40.38, 44.11,	44.12
Barr v Smith (1903) F. (J.) 24		44.70
Battaglia v Battaglia 1967 S.L.T. 49		45.79
Beattie v Beattie (1883) 11 R.85	33.55, 33.63, 33.64, 33.72,	45.61
Beedie v Beedie (1889) 16 R. 648		40.2
Begbie v Nichol 1949 S.C. 158	38.31, 38.36, 38.40, 38.42,	39.12
	39.14, 39.23, 39.25, 39.26,	39.27
	39.28, 39.35, 39.39, 39.76,	44.11-
	44.14,	45.18
Bell v Bell (1890) 17R. 549	40.61,	40.62
Bennet-Clark v Bennet-Clark 1909 S.C. 591		45.18
Berguns, Petitioner 1924 S.L.T. 349	45.57,	45.61
Bethune (Lady), Petitioner (1851) 14D. 10	33.28, 44.9,	44.11
Birnie v Aberdeen C.C. Educ. Com. 1937 S.L.T. 30		44.70
Black, Petitioners (1839) 1 D. 676		45.49
Black v Glendinning (1900) 16 Sh. Ct. Rep. 348	40.67, 44.23,	45.13
Bloe v Bloe (1882) 9 R. 894	33.48, 33.55, 33.56,	33.57
	33.63, 33.73, 44.22,	44.23
Bower, Supplicant (1747) 2 Woodhouselee 385		32.28
Bowman v Graham (1883) 10 R. 1234	33.58, 33.59,	39.61
Boyce v Grahame (1828) 6 S.425		33.13
Boylan v Hunter 1922 S.L.T. 4	37.2, 37.12, 37.23-	37.25
Brand v Shaws (1886) 16 R. 315	37.2, 39.21, 39.28, 40.42,	44.17
Brown v Brown (1947) 64 Sh. Ct. Rep. 86	40.54,	40.55
Brown v Brown 1948 S.C. 5	38.28, 39.67, 39.72,	39.73
	39.76, 39.83,	44.22
Brown v Ferguson 1911 2 S.L.T. 345		40.65
Brown v Halbert (1896) 23 R. 733	40.66, 40.67, 44.17,	45.13
Browne v Browne 1969 S.L.T.		
(Notes) 15	17.33-17.35, 17.40,	17.42
Brydon v Brydon (1907) 15 S.L.T. 236		39.50
Brydon v Wilson (1914) 30 Sh. Ct. Rep 306		11.16
Buchan v Cardross (1842) 4 D. 1268	33.22,	33.35
Buie v Steven (1863) 2 Mor. 208		40.63

Burgess v Haliday (1758) 1 Woodhouselee 68	32.21
Burgess v Milton (1902) 18 Sh. Ct. Rep. 353	40.66, 40.67
Burt v Nicol (1918) 34 Sh. Ct. Rep. 196	40.66, 45.9
Byers v Donaldson (1903) 19 Sh. Ct. Rep. 242	40.66, 44.23

C

Para.

C(Petitioner)(1944) 60 Sh. Ct. Rep. 61	26.5, 26.32
C v D 1968 S.L.T.(Sh. Ct.) 39	29.49
C(A) v C(B)(1902) 5F. 108	39.50, 39.60, 44.14
Cairns v Cairns (1905) 21 Sh. Ct. Rep. 207, 22 Sh. Ct. Rep. 51	38.23
Cairney v Ross (1897) 13 Sh. Ct. Rep. 203	40.63, 44.18
Calder v Alexander 1926 J.C. 51	44.70
Calder v Calder 1960 S.L.T. (Notes) 52	45.70
Caldwell v Stewart (1773) 5 Brown's Supp. 390	32.20
Campbell, Petitioner (1880) 7R. 1032	37.19
Campbell v Barony Parish Council (1896) 13 Sh. Ct. Rep. 242	38.23, 38.38
Campbell v Campbell (1833) 11 S. 544	33.7
Campbell v Campbell 1920 S.C. 31	39.53, 39.55, 39.57, 39.58 39.61, 39.62, 39.82, 44.14
Campbell v Campbell 1956 S.C. 285	38.17, 38.26, 38.48
Campbell v Chalmers (1634) Mor. 16263	32.32
Campbell v Croall (1895) 22 R. 869	38.16, 38.50, 38.51, 39.12 39.17, 39.39, 39.40, 44.22, 45.13
Campbell v Jamieson (1877) 4R.(J.)17	44.70
Campbell v Maquay (1888) 25 Sc.Law Rep. 587	37.2, 37.9, 37.24, 37.28
Cameron, Petitioner (1847) 9D. 1401	33.65, 44.23
Cameron v Cameron (1955) 72 Sh. Ct. Rep. 232	40.55
Cameron v Ross (1898) 14 Sh. Ct. Rep. 210	40.63, 44.14
Chalmers v Gadgirth (1611) Mor. 16239	32.34
Chalmer's Trustees v Sinclair (1897) 24R. 1047	37.2, 37.33
Charteris v Officers of State(1747)5 Brown's Supp. 770	32.17
Cheetham v Glasgow Corp. 1973 S.L.T.(Notes) 50	16.20, 16.23, 16.26 17.3, 39.8, 39.22
Christie v Christie 1919 S.C. 576	45.9
Christie v Christie 1945 S.L.T. 300	40.19, 40.20, 40.24, 40.25
Christison v Christison 1936 S.C. 381	39.68, 39.70, 39.76, 40.5, 44.22, 45.13
Clarke v Carfin Coal Co. (1891) 18R.(H.L.)6	26.22
Clepan v Weymis (1551) Mor. 16227	32.34
Clinton (Lord), Petitioner (1875) 3R. 62	37.19
Cochrane, Petitioner (1891) 18R. 456	37.9, 37.25
Cochrane v Keys 1968 S.L.T.(Notes)64	40.31, 40.32, 44.23, 45.48
Collins, Petitioner 1921 2 S.L.T.36	37.5, 45.13
Colt v Colt (1801) Mor. Appendix <u>voce</u> Tutor no.1	37.19
Corcoran v Muir 1954 J.C. 46	11.16, 44.60
Corlin v Quarrier (1889) 6 Sh. Ct. Rep. 90	40.43, 44.18
Corrie v Adair (1860) 22 D. 897	33.106, 40.63
Couper v Riddell (1872) 9 Sc. Law Rep. 150	40.61-40.64
Craig v Greig & Macdonald (1863) 1 M.1172	8.2, 33.4, 33.5, 33.7, 33.8
Crawford, Petitioner (1899) 6 S.L.T. 380	45.13
Crawfurd v Hunter (1548) Mor. 16227	32.34
Cullen v MacLean 1960 S.L.T.(Notes) 85	44.60
Cunningham's Tutrix, Petitioner 1949 S.L.T.(Notes)11	37.21

D

Para.

D, Petitioner 1938 S.C. 223	26.21-26.24
D(Mrs), Petitioner 1951 S.L.T.	
(Sh. Ct.) 19	25.51, 26.36, 26.48, 26.49
D and D, Petitioners (1945) 61 Sh.Ct. Rep.65	29.2
D(C), Petitioners 1963 S.L.T.(Sh. Ct.)7	26.45, 26.46, 26.52
D(G), Petitioners 1950 S.L.T.	
(Sh. Ct.) 34	26.48, 26.50, 31.23-31.26
D(C) v D(A) 1908 S.C. 737	39.61, 44.14
Dall v Dall (1887) 3 Sh. Ct. Rep. 265	40.61
Dallas v Dundas (1845) 8 D. 318	33.16, 33.38, 33.40, 44.22
Davidsons v Studeman (1553) Mor. 16223	32.32
Davison, Petitioners (1855) 17 D. 629	45.49
Dawkins v Muir (1922) 39 Sh. Ct. Rep. 45	38.28
Delaney v Colston (1889) 16 R. 753	45.57
Dempster, Petitioner 1926 S.N. 15	37.21
Denny v Macnish (1863) 1 M.268	33.20, 33.21, 33.33, 33.39
	33.40, 37.22, 45.13
Dick v Douglas 1924 S.C. 789	37.15, 37.16, 37.32
Dischington v Hamiltoun (1558) Mor. 16227	32.34
Dishington v Hamilton (1558) Mor. 16227	32.34
Donaghue v McIntyre 1911 S.C.(J.) 61	8.22, 12.8
Dornan v Glasgow Corp. 1970 S.L.T.(Sh. Ct.)29	44.70
Douglas v Douglas 1950 S.C. 453	39.76, 39.81, 44.11
Drummond v Morton (1892)8 Sh. Ct. Rep. 256	40.66
Duguid v McBrinn 1953 S.L.T.(Sh. Ct.) 74, 1954 S.C. 105	38.16
	38.18, 38.28, 39.11-39.14, 39.23
	39.27-39.35, 39.45, 39.58
Dunn v Mustard (1893) 1 F.(J.)81 15.10, 15.11, 15.17, 15.20, 15.27	
Durie v Dowhill (1517) Mor. 16216	32.31
Dury v Dury (1666) Mor. 16277	32.34, 32.35

E

Para.

E, Petitioner (1948)65 Sh. Ct. Rep.8	26.14, 26.58, 44.26
E and E, Spouses 1939 S.C. 165	26.56
Easton v Easton (1924)40 Sh. Ct. Rep.186	38.28
Edgar v Inglis (1606)Mor. 16237	32.34
Edgar v Fisher's Trustees (1893)21 R. 325	37.27, 37.28, 45.57
Elder, Petitioner (1903) 5 F. 307	37.5, 45.70
Erskine v Connolly (1916)32 Sh. Ct. Rep.163	44.12, 44.18

F

F, Petitioner 1939 S.C. 166	27.27
F, Petitioners 1955 S.L.T. (Sh. Ct.) 12	24.14
F(Mrs), Petitioner 1951 S.L.T.	
(Sh. Ct.) 17	23.17, 23.18, 23.22, 23.23, 23.27
F(T) and F(H), Petitioners, 1949	
S.L.T. (Sh. Ct.) 48	26.4, 26.47, 26.48, 26.49
Fairley v Fairley (1904) 12 S.L.T. 140	38.12

Farquhar v Aberdeen School Board (1918)34 Sh.Ct.Rep.217	44.70
Farquharson v Gordon (1894) 2 S.L.T. 63	11.2
Farquharson v Guthrie (1864) 5 Couper 454	15.6
Fenwick v Hannah's Trustees (1893) 20 R.848	37.3, 37.10
Ferguson v Blair (1908) 16 S.L.T. 284	44.9
Fergusson v Dormer (1870) 8 M 426	33.28, 44.9
Ferrier's Tutrix at law, Petitioner 1925 S.C.571	37.9, 37.19, 37.20
Fincham v Muirhead (1706) Mor. 5927, 16322	40.61
Fisher v Fletcher (1827)6 S.270	33.4, 33.15, 33.32, 33.39, 44.22
Fisher v Edgar (1894)21 R.1076	39.12, 39.16, 39.18, 39.24, 39.39
	44.12, 44.22, 45.13
Flannigan v Muir (1892) 19 R. 909	39.5, 39.9, 44.9, 44.22, 45.13
Forbes v Caithness (Bishop of)(1613)Mor. 16241	32.32
Forbes, Petitioner 1922 S.L.T. 294	37.20
Foreman v Oliphant (1527) Mor. 16216	32.31
Foxwell v Robertson (1900) 7 S.L.T. 353	40.61, 45.70
France v Anderson (1877) 4 R.(J.)42	8.5, 44.70
Franks v Glasgow Corp. (1942) 59 Sh.Ct.Rep. 139	15.27
Fraser, Petitioner (1893) 1 S.L.T. 126	37.3, 37.9
Fraser v Campbell 1927 S.C. 589	44.60
Fullerton v Boyne (1675) Mor. 16291	32.33

G

Para.

G, Petitioner 1939 S.C. 782	23.22, 23.25, 23.26
G, Petitioner 1955 S.L.T.(Sh. Ct.) 27	24.9-24.11
G and G, Petitioners (1945) 61 Sh. Ct. Rep. 66	26.51
G and G Petitioners 1949 S.L.T. (Sh. Ct.) 60	25.50, 26.5, 44.26
G v Glasgow Corp. (1954) 70 Sh. Ct. Rep. 358	15.27, 45.10
G v H 1976 S.L.T. (Sh. Ct.) 51	39.8, 39.9, 40.42
G v Minister of Pensions 1950 S.L.T.(Sh.Ct.)79	15.20, 15.27
Gibson v Dunnet (1824) 3 S. 249	33.35, 33.38
Gibson v Gibson (1894) 2 S.L.T. 71	40.18, 40.19, 40.25, 40.36
	44.23, 45.13
Gibson v Hagen 1960 S.L.T.(Notes) 24	38.31, 38.34, 38.42
Giffane v Caldwell (1579) 1 Kames 116	32.31
Gillan v Barony Parish Council (1898)1 F.183	38.23, 38.25, 38.38
Gillespie, Petitioner 1964 S.L.T.(Sh. Ct.)67	15.20, 15.27
Gillies v Quigley (1905) 8 F.(J.)1	44.70
Gilligan's Factor v Fraser (1898) 25 R. 786	37.19
Gilmour v Ayr C.C. 1968 S.L.T.(Sh. Ct.)41	17.33, 17.34, 17.42
Glendinning v Flint (1782) Mor. 445	32.20
Goadby v Maccandys 1815 F.C.(N.S.) 482	33.106, 33.111
Goodbrand, Petitioner 1915 1 S.L.T. 446	15.20, 15.26
Gordon v Corsan (1632) Mor. 16259	32.32, 32.33
Gove v Mitchell (1884) 1 Sh. Ct. Rep. 41	33.109
Gover v Gover 1969 S.L.T. (Notes) 78	40.19, 40.21, 40.24, 44.9
Gowling v Castleton School Board(1911)28 Sh.Ct.Rep.165	44.70
Graham v Graham (1780) Woodhouselee 9	32.10
Grant v Yuill (1872) 10 M 511	33.109, 33.110, 40.63
Gray v Gray 1961 S.L.T. (Notes) 83	40.37

Greig v Greig (1947) 63 Sh.Ct.Rep. 171	40.54, 40.55
Gulland v Henderson (1878) 5R. 768	33.30, 33.31, 33.39
Guthrie v Guthrie (1906) 8F. 545	40.3

H

Para.

H, Petitioner 1960 S.L.T.(Sh.Ct.)3	23.13, 31.16, 44.26
H, Petitioners 1952 S.L.T.(Sh.Ct.) 15	23.23-23.25, 23.29, 23.31
H and H, Petitioners 1944 S.C. 347	27.20, 27.30, 27.31
	27.32, 45.32, 45.33
H and H, Petitioners 1948 S.L.T.(Sh.Ct.)37	26.6, 26.21, 26.23
	26.25, 26.32
H and H, Petitioners 1949 S.L.T.(Sh.Ct.)68	10.11, 25.26, 26.6
	26.7, 31.12, 45.33
H(Mr and Mrs), Petitioners 1951 S.L.T.(Sh.Ct.)17	26.54
H(Mr and Mrs L), Petitioners 1951 S.L.T.(Sh.Ct.)46	25.54, 26.46
	26.52
H v McGregor 1973 S.L.T. 110	18.30
Hamilton v Ernock (Lady)(1584)Mor. 16234	32.32
Hamilton's Tutors, Petitioners 1924 S.L.T. 229	37.19
Hannah, Petitioner 1947 S.L.T.(Notes) 55	45.13
Hannah v Hannah 1971 S.L.T.(Notes) 42	40.21, 40.24, 40.26, 40.27
	40.28, 44.12, 44.14
Hart v Hart 1961 S.L.T.(Notes)14	8.2
Harvey v Harvey (1860)22D. 1198	33.42-33.47, 33.55, 33.61
	33.64, 33.69, 44.9, 44.22
Hatrick v Hatrick (1918) 34 Sh.Ct.Rep.299	40.52, 40.53, 44.14
Henderson v Stewart 1954 J.C.94	8.21, 11.22, 11.23, 11.37
Hepburn v Williamson (1932) 50 Sh.Ct.Rep.37	40.73
Heriot-Hill v Heriot-Hill (1906) 14 S.L.T. 182	40.4
H.M.A. v Clark & Clark 1969 S.L.T. 161	11.9, 11.11, 11.18
H.M.A. v Cook & Cairney (1897) 5 S.L.T. 254	13.21
H.M.A. v Craig (1862) 4 Irvine 189	12.9
H.M.A. v Craw (1839) 2 Swinton 449	13.8, 13.9, 13.14
H.M.A. v Crawford 1918 J.C. 1	8.25
H.M.A. v Fairweather (1842) 1 Broun 309	13.18
H.M.A. v Fraser (1901)3 F.(J.)67,8 S.L.T. 416	8.24, 13.7, 13.9
H.M.A. v Gall (1856) 2 Irvine 366	12.11
H.M.A. v Gemmell (1841) 2 Swinton 552	13.10, 13.14, 13.19
H.M.A. v Gibson (1845) 2 Broun 366	13.16
H.M.A. v Kemp & Kemp (1891) 3 White 17	13.7, 13.9
H.M.A. v Kerr (1860) 3 Irvine 627	12.9
H.M.A. v McAllum (1858) 3 Irvine 187	12.9
H.M.A. v McGavin (1846) Arkley 67	13.8, 13.10
H.M.A. v McIntosh (1881) 8 R.(J.) 13	13.8, 13.10, 13.14
H.M.A. v Millar or Oates (1861) 4 Irvine 74	13.21, 13.22
H.M.A. v Scott (1892) 19 R.(J.) 63	12.13
H.M.A. v Thom (1876) 3 Couper 332	13.17
H.M.A. v Wade (1844) 2 Broun 288	13.21
H.M.A. v Watt & Kerr (1868)1 Couper 123	13.12-13.14, 13.28
Hogarth v Reid (1900) 17 Sh.Ct.Rep. 3	38.23, 38.52
Hogg v Scarth (1896) 13 Sh.Ct.Rep. 29	38.23, 44.18
Holmes v Holmes (1954)70 Sh.Ct.Rep.341	40.54, 40.55, 44.12, 44.14
Huckstep v Dunfermline District Educ.Com.1954 S.L.T. (Sh. Ct.) 109	44.70
Huddart v Huddart 1960 S.C.300	10.10, 40.20, 40.21, 40.29, 45.58

Hume v Hume 1926 S.C. 1008	39.63, 39.64, 39.67-39.79, 39.82 40.9, 40.13, 40.47
Hume v Macfarlane (1908) 16 S.L.T.123	8.2
Hunter v McGregor (1897) 13 Sh.Ct.Rep.215	37.22
Hunter v Waddell (1905) 7 F.(J.) 61	15.7-15.10
Hutcheson, Petitioner 1909 1 S.L.T. 71	37.13, 37.31
Hutchinson v Hutchinson (1890) 18 R. 237	44.12

I Para.

I and I, Spouses, Petitioners 1947 S.C. 485	26.11, 26.14
Imrie v Mitchell 1958 S.C. 439	45.35
Innergellie (Lady), Supplicant(1708) 1 Kames 397	32.17
Inspector of the Poor for Glasgow Parish v Reid (1909) 25 Sh. Ct. Rep. 217	11.27
Irvine v Dick 1935 S.L.T. (Sh. Ct.) 33	44.60
Irwin v Bowie (1931) 47 Sh. Ct. Rep. 293	40.45, 40.46, 40.47 40.49, 44.21

J Para.

Jameson v Jameson (1845) 8 D. 86	40.61
Johnson v Johnson 1972 S.L.T. (Notes)15	40.24, 40.38, 44.9, 44.11
Johnston v Clark (1785) Mor. 16374	32.32
Johnston v Otto (1849) 11 D. 718	33.104
Johnston v Johnston 1947 S.L.T. (Notes) 26	40.24

K Para.

K, Petitioner 1949 S.C. 140	23.26, 23.37, 29.2
K and K, Petitioners 1950 S.L.T. (Sh. Ct.) 2	25.51, 26.4, 26.5
	26.29, 26.32, 26.34, 44.26
K v Finlayson 1974 S.L.T. (Sh.Ct.) 51	18.35, 18.37-18.47
Kay v McLaurin (1826) 4 S. 706	40.63
Kelly v Goudie (1896) 13 Sh.Ct.Rep. 321	38.23, 38.35
Kelly v Marks 1974 S.L.T. 118	45.48
Kelly v Webster (1902) 19 Sh. Ct. Rep. 143	40.66, 40.67
Kennedy v Steele (1841) 4 D. 12	33.13, 33.18, 33.19, 33.30 33.37, 33.48, 45.13
	15.29
Kennedy v B 1973 S.L.T. 38	37.2
Kerbechill v Kerbechill (1586) Mor. 9585	26.25
Kerr v Martin (1840) 2 D. 752	40.70
Kerr v Henderson 1933 S.L.T. (Sh. Ct.) 54	26.29, 38.20, 38.31, 38.36
Kerrigan v Hall (1901) 4 F. 10	38.81, 39.12, 39.14, 39.39
	33.45, 33.52, 33.54, 33.55
Ketchen v Ketchen (1870) 8 M 952	33.57, 33.67, 33.68, 33.94, 44.14
Kidston v Smith (1773) 5 Brown's Supp. 390	32.20
Kincaid v Johnstone (1561) Mor. 16228	32.10
Kincaid v Quarrier (1896) 23 R. 676	33.7, 37.33, 44.12, 44.17 44.18
King & Tullibardin v Wedderburne (1576)Mor. 16216	32.31
Kirkland, Petitioner (1848) 10 D. 1232	37.20
Kitson v Kitson 1945 S.C. 434	38.17, 38.26
Klein and another, Petitioners 1969 S.L.T.(Notes)53	39.41, 39.42 44.9, 44.22

L

Para.

L, Petitioner 1951 S.C. 605	8.20, 23.25-23.26,	23.30
L(Mr and Mrs), Petitioners 1965 S.L.T. (Sh.Ct.)66	25.52,	25.53
		26.55
Lang v Lang (1869) 7 M. 445	33.82-33.87, 33.90,	33.92, 33.93
		39.49, 44.23
Langshaw v Muir (1629) Mor. 16252		32.32, 32.33
Law v Elrick (1939) 55 Sh.Ct.Rep. 253		40.42, 44.12
Leuchars v Scott (1892) 9 Sh.Ct.Rep. 108		44.60
Leys v Leys (1886) 13 R. 1223	33.103, 39.12, 39.14,	39.15
	39.24, 40.46, 44.16,	44.23
Linton v Inland Revenue 1928 S.C. 209		37.19
Lilley v Lilley (1877) 4 R. 397	33.54-33.57,	33.70
Logan, Petitioner (1897)25 R. 51		37.19, 45.13
Logan v Cathcart (1827) 5 S. 341	33.15, 33.32,	44.9
	44.22, 44.23,	45.10
Lord Advocate v Stow School Board (1876)3 R.469		44.70
Loughran v Loughran 1949 S.L.T. (Sh.Ct.)77	40.54, 40.55,	44.22
		44.24
Low, Petitioner 1920 S.C. 351		37.22
Lowther v Chien (1935) 52 Sh.Ct.Rep. 197	37.11, 37.24,	37.25
Lundie v Innermeith (1542) Mor. 16220		32.32
Lyons v Young (1900) 17 Sh. Ct. Rep. 59		40.66

M

Para.

M, Petitioner 1953 S.C. 227	24.5, 24.14,	24.19
M and M, Petitioners 1950 S.L.T.(Sh.Ct.)3	26.11, 26.13,	26.15
	26.24,	26.25
M v Dean 1974 S.L.T. 229		19.30
M v M 1926 S.C. 778	39.46, 39.67, 39.70 - 39.76,	39.81
	39.82, 39.83, 44.22, 44.67,	45.13
Magistrates of Edinburgh v Lord Advocate 1912 S.C. 1085		16.24
Malcolm v McGregor (1892) 9 Sh.Ct.Rep. 43		40.63, 44.60
Mann, Petitioner (1851) 14 D. 12		33.26, 33.27
Maquay v Campbell (1888) 15 R. 606		45.57
Marchetti v Marchetti (1901) 3 F. 888		39.50
Marischal v Macdowal (1741) Woodehouselee 9		32.10
Markey v Colston (1888)15 R.921	39.12, 39.15, 39.38,	45.13, 45.57
Marshall v Smith (1904) 21 Sh.Ct.Rep. 60		38.23
Martins, Supplicants (1749) 2 Woodehouselee		32.29
Martin v Martin (1895) 3 S.L.T. 150	40.9, 40.17, 40.24,	40.25
	44.22,	44.23
Martin v Stewart (1885) 16 R. 185		37.3
Mathesone v Wedderby (1534) Mor. 16218		32.10
Miller v Miller (1889) 5 Sh.Ct.Rep. 289	8.27, 37.9, 44.22,	44.23
Miller v Melville (1898) 1 F. 367, 6 S.L.T. 62 and 274		40.63
		40.69
Miller v Miller (1915) 33 Sh.Ct.Rep. 99		38.27, 40.43
Minto v Minto 1914 2 S.L.T. 86	40.9, 40.13,	40.14
	44.11, 44.14,	44.23
Mitchell v Wright (1905) 7 F. 568	28.9, 38.16, 38.31,	38.33
	38.42, 38.43, 38.56-	38.65
		45.13

Mizel v Mizel 1970 S.L.T. (Sh.Ct.) 50	44.62, 44.67
Moncrieff, Petitioner(1891) 18 R. 1029	37.23, 37.33
Moncrieff v Langlands (1900) 2 F. 1111	40.63, 40.66, 44.14
Morrison v Quarrier (1894) 21 R. 889 and 1071	37.7, 39.5, 39.9
	44.9, 44.18, 44.20
	44.22, 45.13
Motion v McFall (1899) 1 F.(J.) 85	11.2, 11.27
Mottram v Butchart 1939 S.C. 89	44.60, 45.13
Muir v Milligan (1868) 6 M. 1125	33.34, 33.39, 33.40
	44.23, 45.13
Muiravonside School Board v Mackay & Baird (1909)	
25 Sh. Ct. Rep. 132	44.70
Muldoon v Greig (1895) 12 Sh.Ct.Rep. 172	40.65
Murphy v Murphy (1952) 69 Sh.Ct.Rep. 25	40.65
Murphy v Smith 1920 1 S.L.T. 25	33.25, 37.11, 37.24
Murray v Forsyth 1917 S.C. 721	38.17, 38.22, 38.28, 40.39
Murray v MacLay (1903) 6 F. 160	37.3, 37.10, 37.11, 37.14
	37.17, 37.22, 37.24, 37.33, 44.20
Murray v Murray 1947 S.N. 102	40.37

Mc	Para.
Macalister v Crawford's Trustees 1909 1 S.L.T. 232	37.31
McAllister v McAllister 1947 S.L.T.(Notes) 9	40.37
Macallister v Macallister 1962 S.C. 406	38.52-38.54
McArthur v McArthur 1955 S.C. 414	40.4
Macaulay v Macdonald (1887) 14 R.(J.) 43	8.4, 44.70
McCallum v McCallum (1893) 20 R. 293	40.3
McCallum v McDonald (1853) 15 D. 535	33.22, 33.32, 33.33
	37.2, 45.57
McCarroll v McCarroll 1937 S.N. 62	40.19, 40.20, 44.22
McClements v McClements 1958 S.C. 286	39.73, 39.76, 39.85
	39.86, 44.21
McCormack v Dunkeld (1874) 1 Guthrie 39	33.109
McCormack v McCormack 1963 S.L.T.(Notes) 3	38.18, 38.42
McCrossan's Trustees (1899) 7 S.L.T. 22	37.5, 37.22, 37.33, 45.57
McCurdie v McCurdie 1918 2 S.L.T. 250	40.13-40.15
McD and McD, Petitioners (1948) 65 Sh.Ct.Rep. 42	8.30, 27.40
Macdonald v Next of Kin (1864) 2 M. 1194	33.28
Macdonald v Lamont (1892) 19 R.(J.) 41	44.70
Macdonald v Macdonald (1908) 24 Sh.Ct.Rep. 271	40.57, 44.12, 45.13
Macdonald v Denoon 1929 S.L.T. 161	40.63, 40.66
McFadzean, Petitioner 1917 S.C. 142	37.5, 37.19, 45.13, 45.70
McFarlane v McFarlane (1847) 9 D. 904	33.55, 33.56, 33.62, 33.63
	33.64, 33.72, 44.15, 44.22, 44.23
McGhie v Reid (1922) 39 Sh.Ct.Rep. 217	40.43
McGrogan v McGrogan (1894) 2 S.L.T. 142	40.51, 40.57
McGuire v McGuire 1969 S.L.T.(Notes) 36	17.40-17.43, 17.58
McIlvain v McQuhirter (1736) Mor. 16340	32.32
McIntosh v Wood 1970 S.L.T.(Notes) 32	37.13
Macintyre v Macintyre 1962 S.L.T.(Notes) 70	45.24
McIver v McIver (1859) 21 D. 1103	33.46, 33.54, 33.58
Mackay v Mackay 1957 S.L.T.(Notes) 17	39.76, 39.85, 39.86, 44.12
	44.21, 45.18
Mackellar v Mackellar (1898) 25 R. 883	35.57, 39.53-39.55, 39.61
	39.62, 39.82

Mackenzie v Mackenzie (1881) 8 R. 574				33.58
Mackenzie v Mackenzie (1887) 25 Sc.Law Rep. 183	39.62,	44.14,	44.22	
Mackenzie v Keillor (1892) 19 R. 963	38.16,	38.24,	38.52,	39.12
		39.15,	39.38,	45.13
Mackenzie v Smith 1927 J.C. 47				44.70
Mackenzie's Tutrix v Mackenzie 1928 S.L.T. 649		40.60,	40.61	
McKenzie v McKenzie 1943 S.C. 108				45.10
McKenzie v McKenzie 1963 S.C. 266				45.51
McKissock v McKissock (1817) Hume 6				40.61
McLay v Thornton (1868) 41 Sc. Jur. 68	33.23,	44.16,	45.13	
McLean v Campbell (1894) 11 Sh.Ct.Rep. 131		38.23,	38.24	
McLean v McLean (1916) 33 Sh.Ct.Rep. 316	38.27,	44.14,	45.13	
McLean v Hardie 1927 S.C. 344	38.44-	38.48,	39.39	
		39.41,	44.14	
McLean v McLean 1947 S.C. 79	39.73-	39.76,	39.81,	39.83
	44.22,	45.67,	45.70	
McLeman v Moray & Nairn Joint C.C. 1955 S.L.T. (Sh.Ct.) 14				44.70
McNab v McNab (1871) 10 M. 248		33.5,	33.27	
McNaught v McNaught 1955 S.L.T. (Sh.Ct.) 9				44.21
Macpherson v Leishman (1887) 14 R. 780	39.12-	39.15,	39.24	
		39.28,	39.37	
McQueen v Coyne 1926 S.L.T. (Sh.Ct.) 110				40.69
McQuire v Fairbairn (1881) 9 R.(J.) 4				15.6
McShane v McShane 1962 S.L.T. 221				45.68
McVeigh v Bonner (1947) 64 Sh.Ct.Rep. 102				38.36
McWhirter v Lynch (1908) 16 S.L.T. 526				8.2

N

Para.

N, Petitioner (1945) 62 Sh.Ct.Rep. 76	23.16-	23.18		
N(Mrs C or CL), Petitioner 1951 S.L.T.(Sh.Ct.) 83				26.33
Napier, Petitioner (1851) 14 D. 10				33.26
New Monkland Parish Council v Erskine 1926 S.C. 385				10.8
Newtown v Ker (1533) Mor. 16218				32.10
Nicol v Nicol 1953 S.L.T. (Notes) 67	40.31,	40.32		
Nicol v Nicol 1970 S.L.T. 302				44.62
Nicolson v Nicolson (1869) 7 M. 1118	33.45,	33.48,	33.49,	33.55
	33.56,	33.57,	33.64,	33.70
		33.71,	44.14	
Nisbet v Nisbet (1733) Lord Hermand's Consistorial Decisions (1684-1773)				33.76
Noble v Noble (1627) Mor. 16248				32.32

O

Para.

O(E), Petitioner 1951 S.L.T.(Sh.Ct.) 11	9.5-9.9,	24.4		
	24.8-24.11,	24.15,	24.18	
			26.54	
O(Mr and Mrs), Petitioners 1950 S.L.T.(Sh.Ct.) 64	27.28,	28.6		
		28.28		
O'Donnell v O'Donnell 1919 S.C. 14	39.6-39.9,	44.18-	44.20	
Ogilvy v Ogilvy's Trustees 1926 S.N. 166		37.5,	45.70	
Oliver v Scott (1778) Mor. 444		32.20,	32.21	

Oliver v Bayne (1894) 2 S.L.T. 106	40.63
Oludimu v Oludimu 1967 S.L.T. 105	45.57, 45.68
Oncken's Judicial Factor v Reimers (1892) 19 R.519	44.60
Orr v Kirk Session of Glassford (1831)9 S.928	14.14

P Para.

Paden v Paden 1922 S.L.T.(Sh.Ct.)4	40.52, 44.12
Pagan v Pagan (1883) 10 R. 1072	33.12, 44.22
Page v General Board of Control 1939 S.C. 182	8.29
Parlane v Perth & Kinross Joint C.C.1954 S.L.T. (Sh.Ct.) 95	44.70
Paterson v Paterson (1899) 2 F. 81	40.3, 45.13
Paterson v McNicoll 1934 S.L.T.(Sh.Ct.) 2	40.48, 40.49, 45.9
Paul, Petitioner (1838) 16 S. 822	33.30
Penningham Parish Council v McAdam (1896) 13 Sh.Ct.Rep. 126	15.28, 44.63
Perth School Board v Cushnie (1906) 23 Sh.Ct.Rep.30	44.70
Perth School Board v Henderson 1917 1 S.L.T. 92	44.70
Peploe v Peploe 1964 S.L.T.(Notes) 44	45.10, 45.25
Ponder v Ponder 1932 S.C. 233	45.67-45.70
Polland v Sturrock's Executors 1952 S.C.535	44.60
Pott v Pott (1833) 1 S. 183	33.108
Pow v Pow 1931 S.L.T. 485.	40.29-40.32, 44.9
	44.14, 44.23, 45.10
	45.18, 45.51
	40.70
Presly v Duguid 1933 S.L.T.(Sh.Ct.) 35	

Q Para.

Quinn v Dundee Educ. Auth. 1929 S.C. 77	44.70
-----------------------------------------	-------

R Para.

Radoyevitch v Radoyevitch 1930 S.C.619	45.67, 45.68, 45.70, 45.78
Raeburn v Dunleavy (1934)50 Sh.Ct.Rep.107	38.16, 38.28
Ramsay v Ramsay 1945 S.L.T. 30	44.61
Reid v Robertson (1868) 6 Sc.Law Rep.77	40.63
Reid v Reid (1901) 3 F. 330	39.60, 40.5, 44.14, 44.22
Reilly v Quarrier (1895) 22 R. 879	37.14, 37.33, 44.18
Richardson v Burns 1963 S.L.T.(Sh.Ct.) 26	38.28, 45.48
Rintoul v Rintoul (1898) 1 F. 22	39.50, 40.52
Robertson, Petitioner 1911 S.C. 1319	44.14, 45.57
Robertson (A & J), Petitioners (1865) 3 M. 1077	8.2, 33.5, 33.23
	33.25, 33.27
Robb v Robb (1917) 34 Sh.Ct.Rep. 136	40.52, 40.53
Ross v Ross (1896) 23 R.(H.L.)67	37.18
Ross v Ross (1917) 34 Sh.Ct.Rep. 52	40.52
Ross v Ross 1930 S.C.(H.L.) 1	45.18
Runciman v Runciman 1965 S.L.T.(Notes) 6	40.20, 40.21, 40.24
	40.29, 44.22, 45.53, 45.58

S, Petitioners (1945)61 Sh.Ct.Rep.131	25.34, 26.4, 26.5
S 1953 S.L.T. 220	9.8
S(J), Petitioner 1950 S.L.T.(Sh.Ct.)3	8.28, 23.14, 26.14, 26.31
S v S 1967 S.C.(H.L.) 46	8.26, 40.29, 45.51
S(E) v S(A)(1870) 42 Sc.Jur. 480	44.11
Samson v Samson 1922 S.L.T.(Sh. Ct.) 34	40.44
Sanderson v Sanderson 1921 S.C. 686	40.4
Sandilandis v Tenentis of N (1569)Mor. 16231	32.32, 32.33
Sargeant v Sargeant 1973 S.L.T.(Notes) 27	45.80
Savage v Jardine (1891) 9 Sh.Ct.Rep. 139	40.43, 44.9
Scot v Scot (1759) Mor.16361	32.37
Seddon, Petitioner (1891) 19 R. 101	37.5
Shafe v MacRae (1903) 19 Sh.Ct.Rep. 226	40.43
Shanks v Shanks 1965 S.L.T. (Notes) 44	44.14
Shannon v Gowans (1921)37 Sh.Ct.Rep. 235	38.28, 38.31, 38.33
Sharp v Jack (1861)1 Guthrie 260	33.112-33.114
Shaw v Richardson (1936) 53 Sh.Ct.Rep.135	37.15-37.17
Shearer's Tutor, Petitioner 1924 S.C.445	37.9, 37.19, 37.20
	37.23, 45.13
Shirer v Dixon (1885) 12 R. 1013	33.48, 45.61
Short v Donald (1765) 1 Woodehouselee 69	32.22
Sinclair v Moulin School Board 1908 S.C. 772	44.70
Sim v Robertson (1901) 3 F. 1023	37.4, 37.31
Simpson v Edinburgh Corp. 1960 S.C. 313	18.22
Sleigh v Sleigh (1893) 30 Sc.Law Rep. 272	39.51, 39.53, 39.57
Smith v Smith's Trustees (1890) 18 R. 241	39.4, 39.9, 44.12
Smith v Smith (1894) 2 S.L.T. 173	40.11, 40.38, 44.11
Smith v Macfarlane (1886) 2 Sh.Ct.Rep. 452	33.110
Smith v Smith 1930 S.L.T. 590	40.4
Smith v Glasgow Corp.(1933) 50 Sh.Ct.Rep.103	38.28, 38.38, 45.13
Smith v Smith 1964 S.C. 218	45.51
Somerville v Lord Advocate (1893)20 R. 1050	16.24
Soutar v Carrie (1894) 21 R. 1050	38.31, 38.37
Spalding v Fleshour (1561)Mor. 16227	32.34
Speid v Webster (1821) 1 S. 221	33.111
Speirs, Petitioner (1854) 17 D. 289	33.22, 33.26
Speirs, Petitioner 1946 S.L.T. 203	37.14, 37.23, 37.24, 37.25
Spicer v Spicer 1946 S.L.T.(Notes) 24	40.20, 40.21, 40.23-40.25
Sproat v McGibney 1967 S.L.T.(Notes)100	8.2
Steuart v Steuart (1870) 8 M. 821	33.82, 33.90-33.94, 39.49
	44.11, 44.14, 44.15, 44.23
	45.18
Stewart v Brodie (1887) 3 Sh.Ct.Rep. 405	40.40, 45.13
Stewart v Stewart 1914 2 S.L.T. 310	40.18, 40.24, 40.38, 44.11
	45.13
Stevenson v Stevenson (1894) 21 R.430	39.49, 44.11, 44.22, 44.23
Stevenson v Stevenson (1894) 21 R.(H.L.)96	39.49, 39.52, 39.57
	40.8, 40.11, 40.17, 40.50
	40.51, 44.12, 44.14
Stevenson v Stevenson 1967 S.L.T.(Notes)7	40.23, 40.24
Stokes v Stokes 1965 S.C. 246	8.26, 10.9, 45.51
Stuart v Henderson (1636) Mor. 9598	37.2
Stuart v Moore (1861) 4 Macqueen 1	37.10, 45.68
Stuart-Brown v Stuart-Brown 1911 2 S.L.T. 35	40.37
Sutherland v Taylor (1887)15 R.224	38.52, 38.54, 39.12, 39.15
	39.24, 39.28, 39.35, 39.38
	40.32, 44.23

Sutherland v Sutherland (1891) 8 Sh.Ct.Rep. 23	40.43
Syme v Cunningham 1973 S.L.T. (Notes) 40	39.2, 40.2
Symington v Symington (1874) 1 R. 871, (1875) 2 R.(H.L.) 41	33.82, 33.94-33.101 40.8, 41.2, 41.6, 41.42, 41.48

T	Para.
---	-------

Taylor v Tarras (1901) 3 Adam 298	15.6
Thomson v Scott (1901) 3 F.(J.) 79	44.70
Turnbull v Monzievaird & Strowan School Board (1911) 27 Sh.Ct.Rep. 358	44.70

U	Para.
---	-------

Urquhart v Urquhart 1961 S.L.T. (Notes) 56	40.37
--------------------------------------------	-------

V	Para.
---	-------

Valances v Forrester (1630) Mor. 16255	32.33
Vere v Dale (1804) Mor. 16389	37.19

W	Para.
---	-------

W, Petitioners (1945) 61 Sh.Ct.Rep. 130	26.57
W v Glasgow Corp. 1974 S.L.T. (Notes) 5	17.18, 17.37
Walker v Walker (1824) 2 S. 788	33.30, 33.31, 33.39 44.67, 45.10
Walker v Stronach (1874) 2 R. 120	33.14
Walker v Croll (1919) 36 Sh.Ct.Rep. 31	40.41, 44.11
Wallace v Goldie (1848) 10 D. 1510	40.61
Wallace v Wallace 1963 S.C. 256	45.25
Walter v Culbertson 1921 S.C. 490	39.11, 39.12, 39.17-39.20 39.24, 39.26, 39.39 39.41, 44.14, 45.13
Ward v Ainslie 1931 S.L.T.(Sh.Ct.) 33	40.71, 40.72
Wardrop v Gossling (1869) 7 M. 532	33.27
Watson (1885) 5 Couper 687	12.4
Webb v Cleland's Trustees (1904) 6 F. 274	37.5
Weepers v Kennoway (1844) 6 D. 1166	14.14, 44.63
Westergaard v Westergaard 1914 S.C. 977	45.67, 45.68, 45.70
Westland v Pirie (1887) 14 R. 763	40.63
White v Jeans 1911 S.C.(J.) 88	15.12-15.15
Whitehall v Whitehall 1958 S.C. 252	45.35
Whitson v Speid (1825) 4 S. 42	33.4, 33.36, 44.11, 44.67
Whittle v Carruthers (1896) 23 R. 775	37.27
Willison and others, Petitioners (1890) 18 R. 228	37.2, 37.9, 37.23-37.25
Wilson v Stirling (1874) 1 R.(J.) 8	15.17, 15.20, 15.21, 15.25
Wilson v Lindsey (1893) 1 S.L.T. 272	40.63
Wilson v McMinnim (1905) 12 S.L.T. 772	44.11
Wilson v Mannarn 1934 S.L.T. 358	11.16, 11.27, 44.60

Wilson v Wilson 1957 S.L.T. (Notes) 6	44.62
Wincentzen v Wincentzen 1974 S.L.T. (Notes) 26	40.20, 40.24, 40.25
Winchester v Cuthbert (1939) 55 Sh.Ct.Rep. 261	29.2
Wod v Monypenie (1557) Mor. 16226	32.32, 32.33
Woods v Minister of Pensions 1952 S.L.T. (Sh. Ct.) 6, 1952 S.C. 529	38.4

X Para.

X v Y 1967 S.L.T. (Sh. Ct.) 87 29.49, 45.32

Y Para.

Y(X), Petitioner 1954 S.L.T. (Sh.Ct.) 86	24.17
Young v Elliot (1904) 21 Sh.Ct.Rep. 12	44.67
Yuill v Taigs (1911) 27 Sh.Ct.Rep. 195	38.23

Z Para.

Z(Y), Petitioners 1954 S.L.T. (Sh.Ct.) 98	27.33, 29.49, 29.51
Z v Z 1954 S.L.T. (Sh.Ct.) 47	25.42, 26.31, 45.32, 45.33
Zamorski v Zamorska 1960 S.L.T.(Notes) 26	40.20, 40.21, 40.24
	40.25, 44.21, 44.23, 45.10
Zwiernik v Zwiernik: Stewart v Stewart 1964 S.L.T. (Notes) 6	45.24

2. ENGLAND

A Para.

A(an infant), Re [1955] 2 All E.R. 202	42.29, 42.30, 42.34
	44.36, 44.40
A(an infant), Re [1963] 1 All E.R. 25.37-25.39, 26.35, 44.52, 44.55	
A(infants), Re [1970] Ch.665	45.76
A decd., Re: <u>S</u> v <u>A</u> (1940) 164 L.T. 230	37.38
AB(an infant), In re [1954] 2 Q.B. 385	14.4, 14.19, 16.8, 16.9
	16.10, 16.11, 16.13, 16.20
A and B(infants), In re [1897] 1 Ch.786	8.14, 42.3-42.5
	42.7, 42.11
Adoption Application 41/61, In re [1962] 2 All E.R. 833	42.41, 42.42
Adoption Application 41/61, In re [1963] Ch. 315	42.41-42.44
	42.46, 43.2, 43.9
	43.29, 43.33, 44.53, 44.54
Adoption Application 41/61 (No.2) [1964] 1 Ch. 48	42.41, 42.45, 42.46

Application No.41 of 1974: Adoption Act 1958,	
Re (1975) 5 Fam. Law 181	30.68
Agar-Ellis, In re: Agar-Ellis v Lascelles (1878)	
L.R. 10 Ch. D. 49	32.7, 34.45, 34.46, 34.49, 34.50, 34.66
	34.87, 44.30, 44.35, 44.38, 44.40
Agar-Ellis, In re: Agar-Ellis v Lascelles (1883)	
24 Ch. D. 317	34.45-34.53, 44.30, 44.38-44.40, 45.17
Allen v Allen [1948] 2 All E.R. 413	41.58, 41.67, 41.68, 41.70
	41.73, 44.34, 44.44, 44.49, 45.8, 45.56
Andrews, In re (1873) L.R. 8 Q.B. 153	34.33, 44.40
Andrews v Salt (1873) L.R. 8 Ch. App. 622	34.63, 34.64, 34.87
	39.7
Angrish v Angrish (1973) 3 Fam. Law 108	41.70
Arensman v Pulman (1975) 5 Fam. Law 183	41.70
Associated Provincial Picture Houses Ltd. v	
Wednesbury Corp. [1948] 1 K.B. 223	18.24
Atkins v Atkins [1939] 3 All E.R. 872	44.66
Austin v Austin (1865) 34 Beavan 257	34.41, 44.30, 44.40
	45.17, 45.47

B	Para.
B (an infant), Re [1958] 1 Q.B. 12	27.28
B (an infant), In re [1962] 1 All E.R. 872	42.1, 42.7, 42.14
	42.15
B (infants), Re [1962] Ch. 201	44.70
B (an infant), Re [1964] Ch. 1	24.21
B (infants), Re [1965] 1 W.L.R. 946	45.61
B (an infant), Re [1967] 3 All E.R. 629	28.20
B (an infant), Re [1970] 2 Q.B. 589	30.1-30.7, 30.14, 30.15
	30.19, 30.20, 30.28
B (an infant), Re [1971] 1 Q.B. 437	44.53
B (a minor), In re (1974) 124 N.L.J. 620	15.40
B (A) (an infant), Re [1948] 2 All E.R. 727	45.33
B (an infant)(adoption: Parental Consent),	
In re [1976] Fam. 161	29.12, 30.72, 30.82
B(GA)(infants), Re [1963] 3 All E.R. 125	10.4
B(MF)(an infant), Re [1972] 1 All E.R. 898	26.40, 26.42, 31.8
	31.9, 44.54
B(S)(an infant), In re (1966) 64 L.G.R. 431	29.30, 29.63, 29.65
B, a minor, Re: S v B (1973) 4 Fam. Law 75	30.68
B(TA)(an infant), Re [1971] Ch. 270	42.1, 45.8
B's Settlement, In re [1940] 1 Ch. 54	42.7, 42.10, 45.71
	45.73, 45.74
B v B [1924] P. 176	41.2, 41.42, 41.48-41.50
B v B [1961] 2 All E.R. 396	45.63
B v B [1971] 3 All E.R. 682	41.56
B v B (1971) 1 Fam. Law 137	41.56
B v B and H [1962] 1 All E.R. 29	41.72
B(B) v B(M) [1969] P. 103	41.57, 41.58, 41.72, 44.31
B(BR) v B(J) [1968] P. 466	45.36
B(M) v B(R) [1968] 3 All E.R. 170	45.26
Baldrian v Baldrian (1974) 4 Fam. Law 12	41.70, 41.72
Ball v Ball (1827) 2 Simons 35	34.14

Barham v Salter (1974) 5 Fam. Law 19				41.70
Barker v Westmorland C.C. (1958) 56 L.G.R. 263	14.7, 14.17, 16.9			17.3
Barnardo v McHugh [1891] A.C. 388	37.7, 37.35, 41.32, 42.26			
	42.30, 44.30, 44.40, 44.66			
Barnardo v Ford [1892] A.C. 326			37.7, 45.57	
Barnes v Barnes (1867) L.R. 1 P. & D. 463				44.43
Bartlett, Ex parte (1846) 2 Collyer 661			34.30, 34.31	
Bazeley v Forder (1868) L.R. 3 Q.B. 559			34.71, 44.43	
Beaufort v Berty (1721) 1 Peere Williams 703				32.60
Benner (infants), In re 1951 W.N. 436	42.11, 44.44, 45.58			
Bent v Bent and Footman (1861) 2 Sw. & Tr. 392				34.106
Besant, In re (1879) 11 Ch. D. 508	34.82-34.86, 45.17			
Bevan v Bevan (1973) 4 Fam. Law 126			41.58, 41.59	
Bilainkin v Bilainkin [1959] 1 All E.R. 161				45.23
Birchall, In re: Wilson v Birchall (1880) 16 Ch. D.141				37.57
Boulden (1957) 41 Cr.App.Rep. 105				11.27
Bowden v Bowden (1974) 4 Fam.Law 126	41.58, 41.70, 41.72			
Bowers v Smith [1953] 1 All E.R. 320	15.41, 15.44, 15.45			
			15.53, 15.54	
Boynton v Boynton (1858) 1 Sw. & Tr. 324				34.96
Boyt v Boyt [1948] 2 All E.R. 436	41.58, 41.67, 41.70			
	41.73, 44.30, 44.38, 44.39			
Brent Corp. v McLymont (1974) 118 Sol.Jo.498			17.27, 17.30	
Brooks v Blount [1923] 1 K.B. 257	8.21, 11.5, 11.21, 11.22			
			11.32, 11.36	
Brown (Ethel), In re (1884) 13 Q.B.D. 614				34.29
Brown v Collins (1883) 25 Ch.D. 56				45.65
Buckley v Buckley (1973) 3 Fam. Law 106				41.67

C

Para.

C(an infant), Re [1959] Ch. 363				45.47
C (an infant), In re (1970) 114 Sol.Jo. 12				41.36
C (an infant), In re (1971) 1 Fam. Law 21				42.15
C(A)(an infant), Re [1966] 1 All E.R. 560	16.11, 16.14, 16.15			44.36
C and the Adoption of Children Act 1926,				
In re [1938] 1 Ch. 121			23.8, 23.9	
CSC (an infant), Re [1960] 1 All E.R. 711	24.5, 24.19, 24.20			
	24.23, 26.28, 29.26, 44.54			
C(L)(an infant), Re [1965] 2 Q.B. 449	29.14, 29.26, 29.30, 29.34			
	29.46, 29.47, 29.60-29.62			
	30.1, 30.19, 44.55, 45.26			
C(MA)(an infant), Re [1966] 1 All E.R. 838	2.32, 25.46, 25.47			
	31.17, 44.31, 44.35, 44.37			
	44.40, 44.44, 44.53, 44.55			
	45.8, 45.18, 45.26			
C(A), Re: C v C [1970] 1 All E.R. 309	42.36-42.39, 44.30			
	44.43, 44.49			
C v C [1947] 2 All E.R. 50				45.26
C v C (1971) 1 Fam. Law 136				41.56
Cahill v Cahill (1974) 5 Fam. Law 16				41.72
Callaghan, In re: Elliott v Lambert (1884) 28 Ch.D.156	37.41, 45.58			

Cammell v Cammell [1964] 3 All E.R. 255	8.8
Carlton, Re: Naturalisation Act 1870 [1945] 1 All E.R. 559	8.19
Carroll, In re [1931] 1 K.B. 317	27.33, 38.57, 40.47, 41.18
	41.21, 41.32, 42.23-42.30, 42.39
	42.41-42.43, 43.3, 43.9, 44.36, 44.40
Cartlidge v Cartlidge (1862) 2 Sw. & Tr. 567	34.100, 34.105, 45.57
Chetwynd v Chetwynd (1865) L.R. 1 P.& D. 39	34.96, 34.101, 34.104
	34.106, 45.51
Chipperfield v Chipperfield [1952] 1 All E.R. 1360	41.55, 41.63
Clarke, In re (1882) 21 Ch. D. 817	34.58, 34.61, 34.63
	34.89, 44.40, 45.17
Clarke v Clarke and Lindsay (1913) 57 Sol.Jo. 644	41.44, 41.73
Cliff v Cliff [1948] 2 All E.R. 760	38.8
Clissold v Clissold (1964) 108 Sol.Jo. 220	41.72
Clout v Clout and Hollebone (1861) 2 Sw. & Tr. 392	38.7
Codrington v Codrington (1864) 3 Sw. & Tr. 494	34.96, 34.105
	34.107, 44.31
Coles v Wallis (1591) 1 Leonard 328	32.56
Collins (an infant), Re [1950] Ch. 498	41.7, 41.17, 41.24
	42.17, 44.40
Colquitt v Colquitt [1948] P. 19	8.2
Cooper v Cooper [1961] 3 All E.R. 539	41.73, 44.43, 45.8, 45.56
Copland v Copland (1973) 3 Fam. Law 105	41.58
Corbett v Corbett [1953] P. 205	45.8
Corcoran v Corcoran [1950] 1 All E.R. 495	45.58
Cumings v Birkenhead Corp. [1971] 2 All E.R. 881	44.70
Curtis, In re (1859) 28 L.J.Ch. 458	34.45, 44.34, 44.43, 45.57
Curtis v Curtis (1858) 1 Sw. & Tr. 75	34.96, 44.43, 45.55

D

Para.

D (an infant), In re [1943] Ch. 305	37.37, 45.47
D (an infant), Re [1958] 1 All E.R. 427	29.20
D (an infant), In re [1959] 1 Q.B. 229	22.9, 23.9, 25.39, 25.40
	25.43, 25.55, 26.15, 26.21
	26.22, 26.25, 26.28, 26.34, 44.54, 44.55
D (minors), Re [1973] Fam. 209	28.21, 28.23, 28.25, 28.26, 28.32
D (an infant)(parent's consent), Re [1977]	
1 All E.R. 145	30.68, 30.82
DX, Re [1949] 1 Ch. 320	26.35, 26.36, 26.40, 26.46, 26.54
	44.52, 44.53
D v D (1965) 109 Sol.Jo. 573	41.65, 41.70
D v D (1976) 6 Fam. Law 149	41.40, 41.59
D v D (infant:access)(1974) 4 Fam.Law 195	41.56, 45.1
D'Alton v D'Alton (1878) 4 P.D. 87	34.96, 34.102, 34.104, 44.38
	44.40, 44.43, 45.51
De Manneville v De Manneville (1804) 10 Vesey Junior 52	34.9, 34.10, 45.65
Dredge v Dredge [1947] 1 All E.R. 29	8.2
Dulles' Settlement Trusts, Re: Dulles v Dulles [1950] 2 All E.R. 1013	45.65
Dyter v Dyter (1973) 4 Fam. Law 52	41.66

E	Para.
E (an infant), Re [1956] Ch. 23	45.58
E (an infant), Re [1963] 3 All E.R. 874	31.13, 31.17, 44.32
	44.35, 44.37, 44.40, 44.44
	44.48, 45.8, 45.26
E(D)(an infant), Re [1967] Ch.287 and 761	44.49, 45.72
E(P)(an infant), Re [1969] 1 All E.R. 323	25.47, 25.48, 26.22
	26.28, 44.53, 44.54, 45.32
Elderton, In re (1883) 25 Ch.D. 220	34.33, 34.34, 34.37, 44.43
Ellard v Ellard (1974) 5 Fam. Law 29	41.66
Eve (1973) 137 J.P. 85	44.32, 44.48

F	Para.
F (an infant), Re [1957] 1 All E.R. 819	44.54
F (an infant), Re [1969] 2 Ch. 238	42.8, 42.11, 42.15, 44.30
	44.31, 44.43, 44.49
F (an infant), Re [1970] 1 All E.R. 344	28.7, 44.52, 44.54
	44.55, 45.33
F (a minor)(wardship: appeal), Re (1975) 6 Fam. Law 147	41.34
F(K)(an infant), Re [1970] 1 Q.B. 385	28.29
F(W)(an infant), Re [1969] 2 Ch. 269	45.8
F v F [1902] 1 Ch. 688	37.40, 37.41, 37.50, 37.51-
	37.54, 37.60, 44.40
F v F [1959] 3 All E.R. 180	41.72, 45.23
F v F [1968] 2 All E.R. 946	41.61, 44.49, 45.8
F v F [1971] P. 1	45.63, 45.64
F v S [1973] 1 All E.R. 722	44.36
Fabbri v Fabbri [1962] 1 All E.R. 35	45.58
Fletcher decd., In re: Barclays Bank Ltd. v Ewing [1949] 1 Ch. 473	8.15
Flood v Flood [1948] 2 All E.R. 712	44.43, 44.46
Foster v Denny (1677) 2 Chancery Cases 237	32.56
Fowler v Fowler and Sine [1963] P. 311	45.23
Fox v Burgess [1922] 1 K.B. 623	44.70
Frame, In re: Edwards v Taylor [1939] 1 Ch. 700	44.55
Frederick v Frederick (1721) 1 Peere Williams 711	32.60
Fynn, In re (1848) 2 De G. & Sm. 457	34.30, 34.39, 34.43, 34.44
	34.48, 43.20, 43.30, 44.2
	44.43, 45.47, 45.55

G	Para.
G (an infant), Re [1956] 2 All E.R. 876	42.31, 42.32, 42.34, 42.36
	44.30, 44.48, 44.54
G (an infant), Re [1962] 2 Q.B. 141	26.7, 31.11, 44.55
G (an infant), Re [1963] 2 Q.B. 73	28.4, 28.7, 28.20, 29.4
	29.34, 31.21, 31.27, 45.33
G (infants), Re [1963] 3 All E.R. 370	14.19, 16.9, 16.10
	16.11, 17.3
G (an infant), Re [1969] 2 All E.R. 1135	44.32, 44.35, 45.72
G(DM)(an infant), Re [1962] 2 All E.R. 546	25.57, 26.6, 26.38
	26.40, 26.42
G v G (1962) 106 Sol.Jo. 858	41.58

G v G (1975) 6 Fam.Law 43	41.70, 41.73
Galloway v Galloway [1955] 3 All E.R. 429	8.9, 10.3
Geapin v Geapin (1974) 4 Fam.Law 188	41.60
Geers v Geers (1974) 4 Fam.Law 155	41.58
Godrich v Godrich (1873) L.R. 3 P. & D. 134	34.96, 45.51
Goldworthy, In re (1876) 2 Q.B.D. 75	34.33, 44.34, 44.43, 45.17
Good v Good (1973) 3 Fam. Law 80	41.58
Goodfellow v Goodfellow (1968) 112 Sol.Jo.332	41.73
Goodinson v Goodinson [1954] 2 Q.B.118, 2 All E.R. 623	41.10, 44.66
Gordon v Gordon and Bell [1903] P. 92	8.2
Gordon v Gordon [1946] P. 99	45.60, 45.61
Green v Green [1929] P. 101	8.2
Greer v Greer (1974) 4 Fam.Law 187	41.58, 41.70

H Para.

H (an infant), Re [1959] 3 All E.R. 746	37.36, 37.41, 37.46 37.48, 45.47
H (infants), In re (1965) 109 Sol.Jo. 575	41.64
H (infants), Re [1965] 3 All E.R. 906	44.31, 44.35, 45.72
H (infants), In re (1965) 63 L.G.R. 396	42.34, 42.35, 42.37
H(A), Re [1963] Ch. 232	45.26
H(GJ)(an infant), Re [1966] 3 All E.R. 154	44.32
H v H [1947] K.B. 463	29.2
H v H and C [1969] 1 All E.R. 262	41.65, 41.69, 41.70, 41.73 42.8, 44.30, 44.35, 44.43 44.49, 45.18, 45.23
H v H (child in care: court's jurisdiction) [1973] Fam. 62	17.38
Hadkinson v Hadkinson [1952] 3 All E.R. 278	45.58
Haleem v Haleem (1975) 5 Fam.Law 184	41.70
Halliday's Estate, Re: ex parte Woodward (1852) 17 Jurist 56	34.33
Hamilton v Hector (1872) L.R. 13 Eq. 511	34.71, 34.77
Hammond v Hammond (1962) 106 Sol.Jo. 610	41.56
Handley v Handley [1891] P. 124	41.2, 41.42, 41.44, 41.45 41.46, 41.47, 41.53, 44.31
Hanks v Minister of Housing and Local Government [1963] 1 Q.B. 999	18.22, 18.24
Harben v Harben [1957] 1 All E.R. 379	41.73, 44.30, 44.43, 45.65
Hares v Curtin [1913] 2 K.B. 328	44.70
Harris v Harris [1949] 2 All E.R. 318	44.66
Hawksworth v Hawksworth (1871) L.R. 6 Ch.App.539	34.65, 44.35 44.40, 44.49, 45.7
Hayes v Hayes 1948 W.N. 361	45.23
Hewer v Bryant [1970] 1 Q.B. 357	41.1
Heyworth's Settlements, Re [1956] 2 All E.R.21	44.66
Higgs v Higgs [1941] P. 27	44.66
Hill v Minister of Pensions and National Insurance [1955] 2 All E.R. 890	14.22
Hitchcock v W B [1952] 2 Q.B. 561	28.21, 28.24, 29.2, 29.6 29.17, 29.21, 29.25, 29.29 29.31-29.33, 29.35-29.39 29.42, 29.51, 29.58, 30.48, 44.54, 45.33
Hollyman, In re (1945) 61 T.L.R.229	27.17, 27.29, 44.53
Hope v Hope (1854) 4 De G.M. & G. 328	34.45, 44.43, 44.46, 44.67 45.65
Hopkins, Ex parte (1732) 3 Peere Williams 152	32.52

Hull v Hull [1960] P. 118	45.8, 45.23
Hunt v Hunt (1884) 28 Ch. D. 606	34.72

I	Para.
---	-------

Infant (An), In re [1965] 1 W.L.R. 754	45.61
Infant(An)(Care or Protection), In re (1965) 63 L.G.R. 338	15.41
	15.45, 15.57
Ives v Ives (1973) 4 Fam. Law 16	41.58, 41.70

J	Para.
---	-------

J(an infant), Re [1960] 1 All E.R. 603	45.8
J(Adoption order: conditions), In re [1973] Fam.106	26.6, 26.41
	26.42, 31.21-31.23, 31.25, 31.27
J v C [1969] 1 All E.R. 788	43.16-43.18, 43.36, 43.38, 44.35
J v C [1970] A.C. 668	2.39, 16.25, 16.29, 29.19, 30.82
	34.3, 34.44, 38.14, 39.22, 39.35
	41.19, 41.40, 42.2, 42.20, 42.21
	42.23, 42.44, 43.1, 43.2, 43.3, 43.6
	43.16, 43.19, 43.20-43.41, 44.14, 44.35
	44.39, 44.40, 45.42, 45.73, 45.76
Jeffrey v Jeffrey (1962) 106 Sol.Jo.686	41.59, 41.72
Jenkins v Howells [1949] 2 K.B. 218	44.70
Johnstone v Beattie (1843) 10 Clark & Finnelly 42	41.12, 41.13, 41.16
	43.20, 43.26
Jussa v Jussa [1972] 2 All E.R. 600	41.58, 41.72

K	Para.
---	-------

K(an infant), In re [1953] 1 Q.B. 117	28.5, 29.6, 29.21-29.23
	29.35, 29.37, 29.49, 29.51
	30.2, 30.5, 44.54, 44.55
K(Infants), Re [1962] 3 All E.R. 178, 1000	41.37, 45.8, 45.18
K(an infant), Re: Hertfordshire C.C. v H. [1972] 3 All E.R. 769	17.40, 17.43, 17.54
Kaye, In re (1866) L.R. 1 Ch. App. 387	34.41, 45.47
Kernot, Re [1965] Ch. 217	44.43, 45.8, 45.74
Kirke v Kirke [1961] 3 All E.R. 1059	44.43
Kirkwood v Kirkwood [1970] 2 All E.R. 161	8.12, 9.2
Knee (Ann), Ex parte (1804) 1 B. & P. (N.R.) 148	34.15, 34.18
Krishnan v London Borough of Sutton [1969] 3 All E.R. 1367	14.4, 16.9, 16.15, 16.18-16.22

L	Para.
---	-------

L(an infant), Re (1962) 106 Sol. Jo. 611	29.14, 29.41, 29.49
	29.59, 30.2, 30.12, 30.48
L(Infants), Re [1962] 3 All E.R. 1	41.40, 42.8, 44.31, 44.47
L(an infant), In re [1968] P. 119	45.36
L(an infant), Re (1974) 5 Fam. Law 24	30.68
L(WJG), In re [1966] Ch. 135	44.55
L(AC)(an infant), Re [1971] 3 All E.R. 743	14.7, 17.5, 17.8, 17.17

L v L [1949] 1 All E.R. 141	8.2
L v L [1969] P. 25	44.32
L v M (1955) 120 J.P. & L.G.R. 27	29.58
Langworthy v Langworthy (1886) 11 P.D. 85	34.95, 34.105
Laxton v Laxton [1966] 2 All E.R. 97	41.58, 41.67, 41.70, 41.73
Lecone v Sheires (1686) 1 Vernon 442	32.39, 32.45
Liddell's Settlement Trusts, Re: Liddell v Liddell [1936] Ch. 365	45.65
Lincoln Corp. v Parker [1974] 2 All E.R. 949	17.27, 17.30
Lindsay v Lindsay [1934] P. 162	45.8
Liverpool Society for the Prevention of Cruelty to Children v Jones [1914] 3 K.B. 813	8.21, 11.2, 11.22, 11.32
Lough v Ward [1945] 2 All E.R. 338	41.10
Lyons v Blenkin (1821) Jacob 245	32.74, 34.5, 34.9, 34.11 34.13, 44.33, 44.43, 44.67

M

Para.

M(an infant), In re [1955] 2 Q.B. 478	27.23, 27.25
M(an infant), Re [1961] Ch. 81	14.17, 16.9
M(an infant), Re [1961] 1 All E.R. 788	16.4, 16.11, 17.17
M(an infant)(No. 2), In re (1964) 108 Sol. Jo. 1031	41.35
M(an infant), In re (1965) 109 Sol. Jo. 574	28.19
M(an infant), Re [1965] Ch. 203	24.22
M(Infants), Re [1967] 3 All E.R. 1071	42.11, 42.12, 42.15, 44.30 44.32, 44.40, 44.43, 44.45 45.18, 45.23, 45.56
M(R)(an infant), In re [1941] W.N. 244	23.13, 27.27, 31.15, 44.53
M(an infant)(adoption: parental consent), Re [1972] 3 All E.R. 321	30.68
M v M and G (1962) 106 Sol. Jo. 877	41.73
M(P) v M(C) (1971) 115 Sol. Jo. 444	41.56
Mallinson v Mallinson (1866) L.R. 1 P. & D. 221	34.96
March v March and Palumbo (1867) L.R. 1 P. & D. 437	34.96, 34.105, 45.51
Margerison v Hind [1922] 1 K.B. 214	44.70
Marsh v Hodgson [1974] Crim. L.R. 35	13.4
Marsh v Marsh (1858) 1 Sw. & Tr. 312	34.99, 34.106, 44.31
May, In re: Eggar v May [1917] 2 Ch. 126	41.10
McGrath (Infants), In re [1893] 1 Ch. 143	37.35-37.41, 37.45 37.46, 37.50, 43.24-43.26 44.40, 44.43, 44.47, 44.49 45.71, 45.73
McKee v McKee [1951] A.C. 352	45.17
Mendes v Mendes (1747) 3 Atkyns 619	34.105
Milford v Milford (1869) L.R. 1 P. & D. 715	15.43, 15.46, 15.48
Mohamed v Knott [1961] 1 Q.B. 1	
Montagn, In re: In re Wroughton: Montagn v Festing (1884) 28 Ch.D. 82	44.40
Morgan v Dillon (1724) 9 Modern 135	32.43, 32.54, 32.55, 32.57 32.58, 32.60, 32.61
Morgan v Morgan (1974) 4 Fam. Law 189	41.70
Mosley-Stark v Mosley-Stark [1910] P. 190	41.44, 44.35, 44.38
Mounter v Mounter (1971) 1 Fam. Law 138	41.58

N

Para.

N(Minors), Re (1974) 4 Fam. Law 93	10.4, 41.7
N(Minors), Re (1975) 5 Fam. Law 186	41.34
N v N (1964) 108 Sol. Jo. 99	45.63
Nevin (an infant), In re [1891] 2 Ch. 299	37.36, 37.41, 37.42- 37.44, 37.50, 44.40
Newbury, In re (1866) L.R. 1 Ch.App. 263	34.58, 34.59, 44.38
Newman v Newman [1970] 3 All E.R. 529	10.3
Newton (Infants), In re [1896] 1 Ch. 740	41.26, 41.28, 41.29 41.32, 44.40, 45.55
Nowell v Nowell [1951] 1 All E.R. 474	44.66
Nugent v Vetzera (1866) L.R. 2 Eq. 704	44.31, 45.70

O

Para.

O(Infants), Re [1962] 2 All E.R. 10	25.58, 41.39, 44.31, 44.32 44.35, 44.40, 44.48, 45.55
O(an infant), Re [1965] Ch. 23	42.41, 42.46, 44.53
O(Infants), Re [1971] Ch. 748	42.1, 42.11, 45.23
O(a minor), Re (1973) 3 Fam. Law 40	41.36
O(a minor), In re (1973) 3 Fam. Law 135	41.34
O(E)(a minor), In re (1973) 3 Fam. Law 48	41.36
Oakey v Jackson [1914] 1 K.B. 216	11.2, 11.7, 11.18, 11.19 15.31, 15.33
O'Donovan v O'Donovan [1955] 3 All E.R. 278	45.58
Official Solicitor v K [1965] A.C. 201	41.41, 41.61, 45.61
O'Hara, In re (1900) 2 I.R. 233	38.31, 38.32, 38.35, 38.43 38.56-38.59, 42.19
Ord v Blackett (1724) 9 Modern 116	32.69
Owen v Owen (1973) 4 Fam. Law 13	41.58, 41.70

P(Infants), In re [1962] 3 All E.R. 789	28.12, 28.15, 28.18 28.20, 28.21, 28.32, 29.30, 44.55
P(Infants), Re [1967] 2 All E.R. 229	45.8
P(an infant)(adoption: parental consent), Re [1977] 1 All E.R. 182	29.12, 29.13, 30.3, 30.72, 30.82
PA(an infant), Re [1971] 3 All E.R. 522	44.55
P(GE)(an infant), Re [1965] Ch. 568	45.65
P v McK (1973) 4 Fam. Law 128	41.70, 41.73
P v P [1971] P. 217	45.63, 45.64
P(LM) v P(GE) [1970] 3 All E.R. 659	41.57, 41.58, 41.73, 44.30
Parnell (Thomas), In the goods of (1872) L.R. 2 P. & D. 379	32.41
Pinch v Pinch (1973) 3 Fam. Law 171	41.70
Plunkett v Alker [1954] 1 Q.B. 420	44.70
Poel v Poel (1970) 114 Sol. Jo. 720	41.73
Poole v Stokes [1914-15] All E.R. Rep. 1083	11.36
Porter v Porter [1971] 2 All E.R. 1037	45.8
Pryor v Pryor [1947] P. 64	41.72, 44.31, 44.41, 45.51, 45.56

Q

Para.

Quinn v Quinn [1920] P. 65	37.38
----------------------------	-------

R	Para.
R, a minor, Re (1974) 4 Fam. Law 153	41.40
R(an adoption), In re [1966] 3 All E.R. 613	28.7, 28.12, 28.27
	28.30
RA(Minors), In re (1974) 124 N.L.J. 599	24.14
R(K)(an infant), Re [1964] Ch. 455	16.11, 16.12, 16.13
	16.20, 16.29
R(M)(an infant), Re [1966] 3 All E.R. 58	41.34, 41.35, 41.38
	44.32
R(PM)(an infant), Re [1968] 1 All E.R. 691	44.36, 44.37, 45.8
R v R [1968] P. 414	45.26
R v R and I [1961] 3 All E.R. 461	44.31, 45.65
Razelos v Razelos [1970] 1 All E.R. 386	45.8
Reynolds v Reynolds (1974) 4 Fam. Law 193	41.67, 41.70
Rhodes v Swithenbank (1889) 22 Q.B.D. 577	37.57
Ridley v Ridley [1953] P. 150	10.2
Roberts v Roberts [1970] P. 1	44.65
Rossage v Rossage [1960] 1 All E.R. 600	45.8
Roughley v Roughley (1973) 4 Fam. Law 91	41.58, 41.67, 41.73
R v Barnardo (Tye's case)(1889) 23 Q.B.D. 305	45.57
R v Bellis (1893) 17 Cox C.C. 660	13.25
R v Bourne [1939] 1 K.B. 687	12.13
R v Brenton (1904) 111 C.C.C.Sess. Pap. 309	11.7
R v Bryson [1974] Crim. L. Rev. 187	19.40
R v Bubb (Hook)(1850) 4 Cox C.C. 455	13.3
R v Chapman [1959] 1 Q.B. 100	12.4
R v Church [1966] 1 Q.B. 59	12.9
R v City of Liverpool Justices: ex parte W [1959] 1 All E.R. 337	31.15, 44.53, 45.33
R v Clarke (Maria): In re Alicia Clarke (1857) 7 E. & B. 186	34.33, 44.30, 44.38, 44.40
R v Coleshill Justices: ex parte Davies [1971] 3 All E.R. 929	9.4
R v Connor [1908] 2 K.B. 26	8.18, 11.5, 11.21, 11.23, 11.35
R v Croydon Juvenile Court Justices: ex parte Croydon London B.C. [1973] Q.B. 426	17.24, 17.26
R v De Manneville (1804) 5 East 221	34.9, 34.15, 44.43
R v Dobbyn (1818) 4 A. & E. 644 n.	34.18
R v Falkingham (1870) L.R. 1 C.C.R. 222	12.5, 12.7
R v Greenhill (1836) 4 A. & E. 624	34.15, 34.17
R v Syngall [1893] 2 Q.B. 232	41.23-41.28, 41.32, 43.25
	44.2, 44.36, 44.38, 44.40, 44.43
R v Hale [1905] 1 K.B. 126	8.16
R v Hale [1974] 1 All E.R. 1107	13.23-13.25
R v Hatton [1925] 2 K.B. 322	11.7, 11.11
R v Hayles [1969] 1 All E.R. 34	10.6, 11.13, 11.18, 11.24
R v Hopkins (1806) 7 East 579	34.16, 44.33
R v Johnson (1723) 8 Modern 214	32.72
R v Jones [1973] Crim. L. Rev. 621	13.26
R v Jones [1974] Crim. L. Rev. 614	19.40
R v Lowe [1964] 2 All E.R. 116	18.35, 19.37, 19.39, 19.40
R v Lowe [1973] 1 All E.R. 805	11.8, 11.19, 12.9, 13.2
R v March (1844) 1 C. & K. 496	13.4
R v Moseley (1798) 5 East 224 n.	32.72
R v Nash: In re Carey (1883) 10 Q.B.D. 454	44.30
R v New (1904) 20 T.L.R. 583	44.39
R v Oxford City Justices: ex partett [1974] 2 All E.R. 356	14.7, 17.5, 17.40, 17.41
	17.43, 17.44, 17.54

R v Powell (1914) 24 Cox C.C. 229	13.25
R v Renshaw (1847) 2 Cox C.C. 285	13.4
R v Ridley (1811) Campbell 650	13.4
R v Roe [1967] 1 W.L.R. 634	11.14
R v Senior [1899] 1 Q.B. 283	8.18, 11.7, 11.16, 11.18
	11.19, 11.23
R v Scott [1969] Crim. L. Rev. 156	19.39
R v Smith (1734) 2 Strange 982	32.76
R v Smith (1826) 2 C. & P. 449	13.4
R v Soper (1793) 5 Term Rep. 278	32.76
R v Storey, Fuat & Duignan [1973] Crim. L. Rev. 645	19.40
R v Walker (1912) 28 T.L.R. 342	41.25, 44.34
R v Ward (1762) 1 Blackstone W. 386	32.70
R v Watson (1959) 43 Cr. App. Rep. 111	11.15, 11.37, 13.2
R v Whibley [1938] 3 All E.R. 777	10.5, 11.26
R v White (1871) L.R. 1 C.C.R. 311	12.6, 12.7
R v Wilson (1829) 4 A. & E. 648 n.	44.33

S

Para.

S(an infant), Re [1958] 1 All E.R. 783	42.13, 45.61
S(an infant), Re [1965] 1 All E.R. 865	16.10, 16.11, 16.12
S(Infants), Re [1967] 1 All E.R. 202	44.38, 45.8, 45.26, 45.56
S(an infant), Re [1973] 3 All E.R. 88	30.68
S(J), Re [1959] 3 All E.R. 856	45.33
S v Huddersfield B.C. [1974] 3 All E.R. 296	17.40, 17.45
S v McC and M [1970] 1 All E.R. 1162	44.32
S v McC: W v W [1972] A.C. 24	45.37-45.50
S v S [1949] P. 269	38.10, 38.11, 45.8
S v S [1962] 2 All E.R. 1	41.56, 44.32, 45.23, 45.56
S v S and T (1963) 107 Sol. Jo. 475	41.63, 41.73
S v S (1968) 112 Sol. Jo. 294	41.60
S v S (1975) 6 Fam. Law. 148	41.40, 41.59
Scanlan(Infants), In re (1888) L.R. 40 Ch. D. 200	37.40, 37.50, 44.30, 44.40
Seddon v Seddon and Doyle (1862) 2 Sw. & Tr. 640	34.105, 34.106
Seymour v Seymour (1859) 1 Sw. & Tr. 332	34.96
Shaxted v Ward [1954] 1 All E.R. 336	44.70
Shelley v Westbrooke (1817) Jacob 266 n.	34.9, 34.11, 34.12
Shelton v Shelton (1965) 109 Sol. Jo. 393	45.63
Skinner v Carter [1948] 1 Ch. 387	44.54, 45.33
Skinner v Orde (1871) L.R. 4 P.C. 60	34.66, 44.40
Skinner v Skinner (1888) 13 P.D. 90	38.8
Smart v Smart [1892] A.C. 425	42.4, 42.12
Snow v Snow [1971] 3 All E.R. 833	8.2, 8.12, 8.13, 9.2
Somerset C.C. v Brice [1973] 3 All E.R. 438	17.26
South Shields Corp. v Liverpool Corp. [1943] 1 All E.R. 338	15.38
Spiers v Warrington Corp. [1954] 1 Q.B. 61	44.70
Spratt v Spratt (1858) 1 Sw. & Tr. 215	34.96, 34.99, 34.105
	34.107, 45.55
Stevenson v Florant [1927] A.C. 211	37.56, 44.30
Stewart v Stewart (1973) 3 Fam. Law 107	41.67
St. John v St. John (1805) 11 Vesey 530	34.71
Stoke-On-Trent B.C. v Cheshire C.C. [1915] 3 K.B. 691	15.38

Stourton v Stourton (1857) 8 De G., M. & G. 760	34.60, 44.34, 44.38, 44.40, 44.43
Stovola v Stovola (1973) 4 Fam. Law 14	41.70
Stuart v Bute (1861) 9 H.L.C. 440	41.14-14.16, 43.26
Surrey C.C. v Battersby [1965] 1 All E.R. 273	9.2, 14.21
Surrey C.C. v S [1973] 1 All E.R. 1027, [1974] Q.B. 124	15.50, 15.51
Swift v Swift (1865) 34 Beavan 266	34.73, 34.76, 34.77, 44.30

T Para.

T(an infant), Re [1969] 3 All E.R. 998	44.38, 44.43, 45.26, 45.74
T(Infants), Re [1968] Ch. 704	45.76
T(AJJ)(an infant), Re [1970] 1 All E.R. 512	16.7, 17.17
T(orse H)(an infant), Re [1963] Ch. 238	37.40
T v T [1968] 3 All E.R. 321	44.31
T v T (1974) 4 Fam. Law 190	41.70
Talbot v Shrewsbury (1840) 4 M. & C. 673	34.42, 44.33, 44.40 44.43, 45.56
Taylor, an infant, In re (1876) 4 Ch. D. 157	34.34
Taylor's Application, Re [1972] 2 Q.B. 369	37.41, 37.57, 37.58
Thain, Re: Thain v Taylor [1926] Ch. 676	38.31, 38.56, 38.63 38.64, 38.65, 40.47, 41.34 42.18-42.23, 42.28, 42.39, 42.42 42.43, 43.3, 43.29, 43.38, 44.35
Thariyan y Thariyan (1974) 5 Fam. Law 123	41.58
Thomasset v Thomasset [1894] P. 295	41.21, 41.43
Thompson v Thompson and Sturmfells (1861) 2 Sw. & Tr. 402	34.96
Todd v Davison [1972] A.C. 392	41.1
Townsend v Townsend (1973) 4 Fam. Law 127	41.58

V Para.

Vansittart v Vansittart (1858) 2 De G. & J. 249	34.71, 34.72, 44.30
Vigon v Vigon [1929] P. 157	41.67, 41.70, 41.73, 44.30, 45.56

W Para.

W, In re: W v M [1907] 2 Ch. 557	37.40, 37.50, 37.55, 37.56 44.38, 44.40, 44.43, 45.7, 45.17
W(Infants), Re [1956] Ch. 384	44.66
W(an infant), Re [1962] Ch. 203	24.22
W(Infants), Re [1965] 3 All E.R. 231	24.4, 29.19, 29.42, 29.43 29.58, 44.35, 44.54, 44.55 45.26, 45.32
W(an infant), Re [1970] 2 Q.B. 589	30.1-30.8, 30.14-30.18 30.29, 30.48, 30.49
W(an infant), Re [1971] A.C. 682	29.14, 29.15, 29.27, 29.28 29.41, 30.1-30.13, 30.17 30.19, 30.22-30.27, 30.31, 30.48
W(JC)(Infants), Re [1963] 3 All E.R. 459, [1964] Ch. 202	10.4, 45.56
W(RJ) v W(SJ) [1971] 3 All E.R. 303	8.11, 9.2

W v W [1926] P. 111	41.51, 41.53, 41.54, 41.57
	41.58, 41.63, 41.73, 44.49
W v W [1952] 1 All E.R. 858	27.22, 44.55
W v W [1970] 1 All E.R. 1157	41.32, 45.38
W v W and C [1968] 3 All E.R. 408	41.65, 41.71, 44.30, 44.43
	45.23, 45.56
Wakeman, Re: W v W [1947] 1 Ch. 607	8.2
Wakeman v Wakeman [1954] 1 All E.R. 434	41.57, 41.58, 41.60, 41.73
	44.31, 45.56
Wallbridge v Dorset C.C. [1954] 1 Ch. 659	14.22, 14.23
Ward v Laverty [1925] A.C. 101	41.29-41.32, 42.17, 43.1
	43.26, 44.43, 44.47, 45.7, 45.55
Warde v Warde (1849) 2 Phillips 786	34.2, 44.30
Watson v Nikolaisen [1955] 2 Q.B. 286	28.9, 28.10, 28.12, 28.32
Watt v Kesteven C.C. [1955] 1 Q.B. 408	44.70
Wellesley v Beaufort (1827) 2 Russell 1	34.7-34.9, 34.11, 34.14
	44.30, 44.43
Wild v Wild [1969] P. 33	41.72, 45.56
Williams (1910) 4 Cr. App. Rep. 89	8.17, 11.24
Willoughby, In re (1885) L.R. 30 Ch. D. 324	45.65
Willoughby v Willoughby [1951] P. 184	41.65, 41.67, 41.68, 41.70
	41.73, 44.44
Witt v Witt [1891] P. 163	41.2, 41.43, 41.44, 41.47, 45.8
Woodward v Oldfield [1928] 1 K.B. 204	44.70

X

Para.

X, In re X v Y [1899] 1 Ch. 526	37.38, 37.41, 37.46, 37.47
	37.48, 37.52, 44.40
X's Settlement, Re [1945] 1 All E.R. 100	42.10, 45.75

ABBREVIATIONS

The following abbreviations are hereafter used :-

Bankton	Lord Bankton, <u>An Institute of the laws of Scotland in Civil Rights</u> (Edinburgh, 1751).
Berlins & Wansell	Berlins M. and Wansell G., <u>Caught in the Act : children, society and the law</u> (Penguin, 1974)
Bevan	Bevan H.K., <u>The law relating to children</u> (London, 1973).
Blackstone	Blackstone W., <u>Commentaries on the laws of England</u> (London, 1791)
Bromley	Bromley P.M., <u>Family Law</u> (London, 1971)
Cavanagh	Cavanagh W.E., <u>Juvenile courts, the child and the law</u> (Penguin, 1967).
Clarke Hall & Morrison	Goodman L. (Ed.), <u>Clarke Hall and Morrison's Law relating to children and young persons</u> (London, 8th ed., 1972)
Clive & Wilson	Clive E.M. and Wilson J.G., <u>The law of husband and wife in Scotland</u> (Edinburgh, 1974).
Cretney	Cretney S.M., <u>Principles of family law</u> (London, 1974).

- Eekelaar Eekelaar J., Family security and family breakdown (Penguin, 1971).
- Evidence Report Law Reform Committee, Seventeenth Report (Evidence of opinion and expert evidence) (Cmd. 4489, 1970)
- Field-Fisher Report Report of the Committee of inquiry into the care and supervision provided in relation to Maria Colwell,
- Ford Ford D., Children, courts and caring : a study of the children and Young Persons Act 1969 (London 1975).
- Franklin Franklin A.W. (Ed.), Concerning child abuse : papers presented by the Tunbridge Wells Study Group on non-accidental injury to children (Edinburgh 1975)
- Fraser Lord Fraser, Parent and child and guardian and ward (Edinburgh, 2nd ed., 1866).
- Freeman Freeman M.D.A., The Children Act 1975 (London, 1976)
- Gordon Gordon G.H., The criminal law of Scotland (Edinburgh 1967).
- Hall Report Law Commission, Arrangements for the care and upbringing of children (Law Com. W.P. No. 15, 1968).
- Halsbury Halsbury's Laws of England (London, 4th ed.)

- Holden Holden D.A., Child legislation 1969 (London, 1969).
- Houghton-Stockdale
Report Report of the Departmental Committee on the adoption of children (Cmd. 5107).
- Howells Howells J.G., Remember Maria (London, 1974).
- Hume Hume, ,Baron, Commentaries on the law of Scotland respecting crimes (Edinburgh, 1797).
- Hurst Report Report of the Departmental Committee on the Adoption of Children (Cmd. 9248).
- Josling Josling J.F., Adoption of children (London, 1965).
- Kenny Kenny C.S., Outlines of criminal law (Cambridge, 16th ed., 1952).
- Kilbrandon Report Report of the Committee on children and young persons : Scotland (Cmd. 2306).
- Leeding Leeding A.E., Child care manual for social workers (London, 2nd ed., 1971).
- Macpherson Macpherson W., A treatise on the law relating to infants (London, 1842).
- Maxwell Maxwell P.B., The interpretation of statutes (London, 12th ed., 1969).

- Morton Report Report of the Royal Commission
on marriage and divorce (Cmd.
9678).
- Mumford Mumford G.H.F., A guide to
juvenile court law (London,
7th ed., 1970).
- NSPCC Report NSPCC, At risk : an account
of the work of the battered
child research department
(London, 1976).
- Pollock & Maitland Pollock F. and Maitland F.W.,
The history of English law
(London, 2nd ed., 1968).
- Renvoize Renvoize J., Children in
danger : the causes and
preventing of baby battering
(London, 1974).
- Seglow, Pringle & Wedge Seglow J., Pringle M.K., and
Wedge P., Growing up adopted :
a long-term national study of
adopted children and their
families (London, 1972).
- Stair Viscount Stair, The
institutions of the law of
Scotland (Edinburgh, 1681,
ed. J.S.More, 1832).
- Triseliotis Triseliotis J.P., Evaluation
of Adoption policy and
practice (Edinburgh, 1970).
- Walker Walker N., Sentencing in a
rational society (Penguin,
1972).

Watson & Austin

Watson J.A.F. and Austin
P.M., The modern juvenile
court : a guide for magistr-
ates, social workers, police
and others (London, 1975).

1968 Act Notes

SWSG, Children's Hearings :
notes on Part III of the
Social Work (Scotland) Act
1968 (Edinburgh, 1970).

Welfare is the centrifugal concept in much of the law relating to children. Sometimes it is identified in terms of certain objective components, for example, health, morals, education, maintenance and even the viability of relationships; sometimes in terms of welfare itself. In either case the criteria are flexible and attract a considerable degree of discretion at the stages of interpretation and application. The system as a whole comprises a series of legal persons with authority to make decisions affecting the child. They include parents, step-parents, foster parents, relatives, strangers, local authorities, children's hearings, juvenile courts and other executive and judicial institutions. Their powers are distinctive and, although parents may be granted a stronger status they are not intrinsically different. Such persons, including parents, have interests liable to be given effect in terms of their legal authority rather than rights liable to be enforced judicially. Parents thus hold office with certain duties and responsibilities. Parental failure may justify suspension or deprivation of authority.

These authorities are not exercisable simultaneously. Nevertheless overall authority over the child may be fragmented, thus permitting different persons to exercise limited authority at the same time. The approach of the legal system is to provide machinery for resolving these potential conflicts. There are two techniques. Has the holder of the authority, normally a parent or a guardian, so conducted himself that his exercise of the power should be suspended or terminated: the threshold question. This is largely an adjudicative function, frequently but not always

given to a judicial body, and as such the criteria are normally the objective components of welfare. If the threshold question is answered positively, the second stage is to determine what thereafter should happen to the child: the discretionary question. This is largely an administrative function, speculative in nature and sometimes given to a judicial body.

Welfare plays a part in these processes, whether relating to official care, adoption, custody or guardianship and whether the source is statutory or common law. The executive bodies are constrained by the legislation and the judicial bodies have frequently imposed constraints upon themselves. The attitude of the courts has been influenced by the development of parental authority and by Parliamentary policy. The discretionary stage exhibits a number of approaches: namely, the threshold approach itself, the presumptive and subsumptive approaches and the balancing approach. Welfare plays a distinct role in these approaches in each of the contexts in which it is relevant.

CHAPTER 1

THE CONTEXT AND BACKGROUND

Section 1 - The purpose of the study

1.1 A casual glance at any statute dealing with children or at any reported judicial decision on a similar matter discloses that the welfare or interest of the child more often than not has some part to play in the decision-making process. The purpose of this study is simply to ascertain what part the welfare of the child does play in the legal system. The corollary of that purpose is much more complex: to see whether there are any trends or movements in the way welfare has been treated by Parliament and by the courts.

1.2 Although the intention is to examine the system as it is, the law relating to children is subject to such continual modification and so liable to be affected by non-legal considerations that it cannot be conceived as a static body of rules. It needs to be seen against the background of its own development to enable its dynamic perspective fully to emerge. This has necessitated examining some of the fundamental origins of the system and in so doing it may be possible to perceive some coherent concepts against which the development as a whole is sensible. So the initial simplicity of examining the role of welfare has involved a review of some of the main principles of the law of children.

1.3 The fundamental principles of the law of children are so closely related to the concept of welfare that it is impossible to separate them. One of the rather startling aspects of the law relating to children is that no attempt has been made in modern times to trace the development of current doctrines and to place them in some overall perspective. Certainly some attention had been paid to fundamental principles prior to the second half of the nineteenth century, particularly by certain of the Scottish institutional writers and to a lesser extent by Blackstone.¹ But none of these studies analysed in detail the position of children. They were regarded as unimportant except when they had some interest in property. This element of disregard was probably not in any way an inhuman approach. The system, whether social, political or legal, directed attention elsewhere.

1.4 Some important studies were made during the middle of the nineteenth century, particularly those of Macpherson² and Chambers³ for the law of England and that of Fraser for the law of Scotland. But they were systematic statements of the law or practical guides to

1 Chapter 32.

2 Macpherson W., A treatise on the law relating to infants (London, 1842).

3 Chambers J.D., A practical treatise on the jurisdiction of the High Court of Chancery over the person and property of infants (London, 1842).

the system rather than perspective analyses of the role of the law and of its nature. Although these works are a mine of information, they tend to lack any synthetic statement of principle.

1.5 The modern law began to be conceived only about the date of publication of these works and almost entirely at the instance of Parliament. It was during the second half of the Victorian era that the State began to take a more positive part in relation to children by enabling statutory interference with parental rights and interests, by attempting to influence the administration of justice by the courts and finally, but not until the second quarter of this century, by recognising and validating the adoptive status. Since then, many changes have been enacted. They tend to follow the same pattern set by the late Victorian legislatures and the differences between them and now are more of degree than of principle.

1.6 These features have been recorded in the several works dealing with the law of children. But they take as their starting point the supremacy of parental rights which was alleged to exist in law during the second half of the nineteenth century. Since then the development of the law has been seen as a waning of parental rights⁴ and

⁴ Hall J.C., "The waning of parental rights" (1972) 31(1) Cambridge Law Journal 248.

a greater and growing emphasis on the interests of the child.⁵ This may be an over-simplification, particularly in Scotland, and the second purpose of this study has become, in addition to the original objective of identifying the role of welfare, an attempt to elicit the overall pattern of development of some of the fundamental principles of the law.

Section 2 - The nature of the study

1.7 The unified Parliament of the United Kingdom enacted much of the relevant statute law in similar if not identical form for Scotland and England. This legislation was imposed upon systems which were in many respects quite different in principle. This is certainly true in relation to custody and guardianship and, most importantly, the legal relationship between parent and child was not the same in the two jurisdictions. This is not to suggest that Parliament should not have intervened. But, it is submitted, Parliament should have been more careful, particularly in regard to Scotland, how it intervened.

1.8 Official guardianship, whether at the instance of local authorities, juvenile courts in England or children's hearings in Scotland, and adoption are both the creatures of statute. Much of the jurisdiction of courts in

5 Bevan, p. 257. See also Stone J., Social Dimensions of Law and Justice (Sydney, 1966), pp. 237 and 238.

relation to custody, guardianship and similar matters is now statutory and any decision on these matters, whether the jurisdiction is statutory or not, is affected by one or more statutory directions, particularly the paramountcy of welfare principle. It would appear therefore that no decision relating to children can be made without reference to one statutory provision or another.

1.9 Although almost all law relating to children is statutory, many of the most important provisions bearing upon the substantive decision to be reached by a court or by an executive body are drafted in a relatively flexible manner. In consequence the operation of the law is affected as much by the views of the decision-maker on the nature of his functions and on the meaning of the legislation as by the formal rules of law themselves. This is both the strength and the weakness of the system. It is on the one hand an attempt to do justice in the individual case and on the other hand the quality of the decision lies in the hands of the nominated decision-maker.

1.10 This study falls for these reasons into two categories. It is possible to consider the legislation purely in terms of its phraseology. Such an analysis would be purely static. It is perhaps more important, and perhaps more difficult, to ascertain how those who apply the legislation actually see their functions. This study

is, of course, a legal investigation. It is therefore concerned to see not whether the system is achieving what may be regarded as its social objective but only whether the approach of the decision-makers falls within their statutory framework. Interpretation is thus as vital to this part of the analysis as it is to the static part of the study. Questions of interpretation and application are in a sense the link between the static law and its dynamic operation.

1.11 The law under investigation is functional and structural. It is also flexible in content, particularly as regards welfare. Its basic characteristic is thus discretion. That being so, there may be considerable debate on how such discretions, whatever their form, should be exercised. The legislation frequently does not say so. Courts in particular like some assistance in exercising discretions and seek out schemes, policies, principles or ideas implicit in the legislation to assist in this way. In doing so they may be going beyond the traditional judicial function. But they cannot be regarded as going beyond the law, for Parliament has given them this sort of function. Much of the discussion, then, is in terms of policy, purposes and objectives. It is easier for this study to do so than for a court to do so. A good deal of reliance is thus placed upon material which a court would not use or at least which it would hesitate to use. No apology is given for using this

information. It is part of the nature of the study and implicitly part of the nature of the law which is the subject of the study.

1.12 The nature of the law under review thus influences the nature of this study. Statute law predominates. A great deal of attention is paid to the minutiae and the precise language of the legislation. The analysis revolves around interpretation and construction, policies and objectives, discretions and functions. This is as true for the earlier law as it is for the contemporary system. Much of the earlier law has often been discussed more in terms of rights than of powers and functions, especially during the nineteenth century. To some extent this is regarded in this study as a Victorian aberration, as a reversion to the original concepts of the law governing children will show. The nature of this study is thus threefold: a consideration of the legislation, of its historical evolution and of its operation.

1.13 What of the courts? They are not seen as the centre around which the whole system revolves; they are merely one among a number of decision-makers recognised by the system. The legal issues are who may make decisions affecting children and how they should be made. The law generally is not concerned with the decision itself; it is concerned at most with its validity. It is

for these reasons that the law has been described as structural. The range of decision-makers is wide: parents, guardians, local authorities, central government, children's hearings, friends, relatives, interested third parties or agencies, and, of course, courts invested with relevant jurisdiction. The law does little more than settle competitions for power or authority among these various decision-makers. Once the legal system has indicated which person or body is appropriate to make the decision, its function is complete.

1.14 The complexity so far as the courts are concerned is that they may operate at two different levels within the system. Firstly, the court itself may be the appropriate decision-maker, as in the case of conferring or suspending custody, guardianship or similar "rights". Here the court is functioning in much the same way as, for example, a children's hearing. In addition, the court, acting in its more traditional judicial role, may be asked to ensure that the decision has been made by the relevant body and that that body has remained within the boundaries of the authority set for it by the legal system. Confusion may easily arise when a court is acting in this way both executively and adjudicatively. Such confusion arises most frequently in custodial matters where the roles of the court are often blurred, while in adoption cases the courts are much concerned to separate questions of competency from those affecting the merits of

the decision. This difficulty is the foundation for the distinction which recurs frequently in this study between the threshold and discretionary stages of the decision-making processes.

1.15 This double judicial function causes technical problems. Decisions of courts on such matters are normally reported in only slightly modified form. Decisions of other bodies exercising similar functions are not reported at all. There is no harm in this but it means that reported judicial decisions must be handled with extreme care. A decision on the merits, that is where the court is exercising a direct and authoritative decision-making function, is binding in a legal sense only on the parties. But a judicial decision may also contain propositions of law which may be binding in the wider sense recognised by the doctrine of precedent. In practice it is often difficult to distinguish between the two. Hence much of this analysis is concerned with the "approach" of the court to the decision made by it rather than with the decision itself: a technical and sophisticated point but vital to this study.

Section 3 - Methodology

1.16 The methodology, as the purpose, of this study is entirely legal. There is no question of any discussion or comment on the value of the system as a social or political institution. The consequence is that reported cases are

important not for the quality of their decisions but for the legal approach inherent in the decisions. Frequently the sources for analysis go beyond the statutes and the reported cases, so far as they may be regarded as traditional, and include questions of policy elucidated in Parliamentary proceedings and official reports. Text-books and periodical contributions have tended to avoid the main issues of this study and have thus generally little to contribute.

1.17 The approach in the first instance is twofold: to consider the system as a static set of rules and powers and then to treat the system as a dynamic operation. The study is completed by considering some of the consequences and incidentals of the concept of welfare which also operate to serve as a final overall perspective view of the whole study. The main theme is expounded in chapter 2 and the detailed remainder serves to expand and justify that theme in the various contexts.

1.18 The three parts of the static analysis comprise firstly a classification of the various roles of welfare as they emerge from the legislation and the subordinate legislation. The welfare or the interest of the child is sometimes referred to as such in the legislation. The welfare of the child is also frequently referred to in the legislation in terms of its more objective component parts; for example, health, moral or spiritual well-

being, education, security of relationship, or more obliquely, parental unfitness, abandonment or neglect. In either case the concept or component of welfare forms part of a threshold requirement or part of the more open discretionary stage of the decision-making process.

1.19 Policy is, indirectly at least, a vital element in the process, particularly as it affects the interpretation placed upon the individual word or the phrase in the legislation. In many respects the possibility of flexible interpretation is one of the techniques used by Parliament to give effect to its underlying objectives. In that sense interpretation is one of the main links between the static and dynamic approaches to welfare.

1.20 The contribution of the criminal law completes the static analysis. The criminal law operates only ex post facto. In itself it is unlikely to produce a solution to the problems of a child, whether the offender is the parent or the guardian or even the child. But the criminal law is important, for its approach reinforces the fundamental distinction drawn by this analysis into the threshold and discretionary stages of the overall decision-making process. It does so in a remarkably clear way: the proof of guilt, on the part either of the parent or the child, and the subsequent decision as to what to do with the child thereafter, in terms either of the penal or

quasi-penal system or in terms of the system of official guardianship or care. For that reason it is discussed early in the study. It also serves as a link between the static and dynamic elements of the total system.

1.21 The most important part is the dynamic analysis. It looks at official care, adoption, then custody and guardianship matters in that order. The order and method of dealing with the subject matter are not fortuitous. If chronological development were the criterion, custody and guardianship matters would have come first. But the order chosen most clearly demonstrates the theme which the study is designed to illustrate. The official care legislation, the expression used to include the Children and Young Persons Acts and the Children Acts in England and the Social Work (Scotland) Act in Scotland, contains several clear examples of the division into the threshold and discretionary stages, partly because the functions in Scotland are conferred upon different bodies, while in England their different nature is made clear by implication. This is less true for adoption where the courts are responsible for both functions, although they are fairly clearly differentiated. Custody and guardianship matters are altogether different. All the functions are exercised by the courts and it is by no means clear when and to what extent the court is acting adjudicatively or executively.

1.22 A different method could have been adopted.

Instead of looking at official care, adoption and custody, it would have been possible to consider the threshold approach in its several contexts followed by the discretionary approach in its various contexts. Other methods could have been selected. But the one selected, it is suggested, is likely to have the greatest impact in establishing the theme to be examined and for that reason it has been selected.

1.23 There are fundamental differences between the concepts of official care, adoption, and custody and guardianship. But whether the approach has been created directly by Parliament, as with official care and adoption, or whether it has evolved in consequence of an interaction between the common law and statute law, as in the case of custody and guardianship matters, it remains in many important respects similar in each context. The division into the threshold and discretionary stages is fundamental. Sometimes it is clearer in one case than in another. That is simply a question of emphasis. But the underlying division, it is suggested, is clear on careful analysis.

1.24 This division recurs in different ways in the various contexts. On the one hand there may be a decision which is formal or legalistic. Whether it is made by a court or an executive body is largely unimportant for present purposes. It is the nature of the decision which

is important. Such a decision is followed by a second decision which is much more flexible in nature. On the other hand it may be significant to stress the retrospective nature of the first decision where it is based upon past events or behaviour, as against the prospective or indeed speculative nature of the second decision. To some extent the quality of the final outcome depends upon the relationship between the two parts of the process: a matter largely unregulated by the law. Another alternative is to see the first decision as adjudicative and the second as executive.

1.25 However it may be analysed, the law concerning children is concerned with decisions, decision-making processes and authorities to make decisions rather than with standards, rules or regulations in the more traditional, normative sense. Not that standards are irrelevant: they are vital. But they are directed to the quality of the decision-making process rather than to the legal quality of what has happened. The latter has a bearing upon the former but it is not normally decisive. The law and this study are thus concerned more with issues of authority than with the application of general standards. This again is a consequence of the clear but unstated policy of the law to achieve a solution satisfactory less in general terms and more in relation to the individual case. In this sense the threshold stage contains the attempt to comply with the minimum stated requirements

while the discretionary stage emphasises the individuality of the circumstances. Each of the three substantive areas of the law postulates a different balance between the two parts of the process.

1.26 Finally, the method in seeking to analyse this division of approach is wideranging. Although the ultimate objective is to examine the role of welfare, this in practice necessitates considering the historical evolution of the principles of the law together with a view of the current perspective of these principles. This too could have been done by looking at the historical development and current perspectives overall rather than treating official care, adoption and custody separately. Again the method adopted has been to examine these matters in the context of the three substantive areas, the reason being to emphasise the similarity of approach in each context rather than to lose that impact in a total overview.

1.27 This means that the discussion ranges over legislation no longer effective and legislation not yet fully in force. This is not a weakness in the method adopted. On the contrary it demonstrates, it is suggested, the underlying strength and validity of the scheme constructed by this study, simply because it transcends the detail of the law from day to day in force. It is based ultimately however upon the system as it is now.

1.28 The other aspect is that this study embraces the

law of Scotland and the law of England. Although the foundations of the two systems are different, the statutory superstructure is so similar that one might almost be excused for anticipating a similar if not identical approach to children by the courts. This has not happened. It is one of the incidental purposes to ascertain these practical differences and to suggest why they may have come about. But overall there can be little doubt that the two systems recognise and apply the fundamental division into the threshold and discretionary stages. Sometimes one jurisdiction is used to illustrate a point; sometimes the other system; sometimes both are mentioned. Usually reference is made to the position in the other jurisdictions but not always. Again this is not an important defect, even if it is regarded as a defect. For this study is not intended to be a comprehensive statement of the law in force at a certain date in both jurisdictions. It is conceived only as an attempt to examine the role of welfare in the law relating to children in Scotland and in England: a point incapable of overemphasis.

Section 4 - The definition of expressions

1.29 Even this chapter has used several expressions not normally used in this context; for example, the word "threshold". There are several such words and expressions used in this study. It is probably as well to mention them now at the outset to give some indication of what they are

intended to mean.

1.30 The word "welfare" is used with regularity throughout this study. It is employed in a general sense unless the context clearly requires a narrower meaning. But in that event reference is usually made to the relevant component element of welfare. Although "welfare" is not synonymous with the interests of the child, these two expressions are used interchangeably. If not, some specific reference is intended, for example, a statutory provision using either word, and that will be clear from the text. Any reference to the welfare concept or the welfare doctrine simply means the totality of the idea of the welfare of the child without in any way dividing it into its various aspects. On the other hand by the principle of the paramountcy of welfare is meant the approach contained in section 1 of the Guardianship of Infants Act 1925⁶ and in section 1 of the Guardianship of Minors Act 1971.⁷ By the principle of the primacy of welfare is meant the approach directed by section 3 of the Children Act 1975⁸ and by section 6 of the Adoption Act 1976;⁹ that is similar to but clearly not the same as the idea now embodied in section 12(1) of the Children

6 15 & 16 Geo. 5, c. 45.

7 1971 c. 3.

8 1975 c. 72.

9 1976 c. 36.

Act 1948¹⁰ and in section 20(1) of the Social Work (Scotland) Act 1968¹¹ as substituted by sections 59 and 79 of the Children Act 1975 respectively. Any reference to welfare as a test means welfare or an aspect of welfare as part of a wider process. In this sense the principles of the paramountcy and the primacy of welfare are both tests, but tests of a rather special kind.

1.31 The study distinguishes between the protection and promotion of welfare. This terminology appears occasionally in legislation and more frequently in reported judicial decisions, but perhaps not always with the same meanings. Here, however, protection means safeguarding a child from persons who have harmed or are likely in some way to harm the child or safeguarding a child against some known or anticipated harm. Protection or safeguard is thus essentially a negative solution from the child's point of view. Promotion on the other hand is a positive idea. It means making a decision which it is anticipated will not only protect the child against harm but also achieve a solution desirable from the child's point of view. It implies a choice from among several possibilities intended to improve the child's condition.

1.32 The distinction between protection and promotion

10 11 & 12 Geo. 6, c. 43.

11 1968 c. 49.

is an element in the division of the total process into the threshold and discretionary stages. "Threshold" implies a first step prior to the later part of the process. Such a first step may relate either to requirements which must be fulfilled before the second stage can be reached or it may relate to the first stage of a process in which for some reason it is desirable to consider a certain matter first. In that event the first step is not a threshold requirement but only a threshold consideration. It is ultimately a matter of law whether it is a requirement or a consideration but one of the features of the development of the law is the judicial tendency to afford certain considerations, including at times welfare, a greater status in practice than the law has formally required.

1.33 There has been one particular example of that judicial technique. Where the law has not apparently formally created threshold requirements, some courts have nevertheless treated certain considerations as if they were, if not legal principles, at least legal considerations which should be given presumptive effect. This is called the presumptive approach. In practice it is similar to the threshold approach, the term used to describe the more formal division into the fulfilment of threshold requirements followed by the exercise of a discretion.

1.34 The presumptive approach should be distinguished

from the subsumptive approach. This takes place when the court subsumes under the heading of welfare everything of relevance to the issue but considered only from the point of view of the welfare of the child. The presumptive approach, for example, treats the position of the parent as a matter of priority in terms of principle; the subsumptive approach treats the position of the parent as one among a number of considerations regarded only from the welfare point of view. From this it follows that there is an important difference between requirements and considerations.

1.35 There is one further kind of approach in addition to the threshold, presumptive and subsumptive approaches: namely, the balance approach. This is no more than a direction, either legal or administrative, to take into account all relevant considerations and to reach a decision on the basis of affording to each its due weight and assessing the one against the others. The matter may be complicated by a legal direction on what weight should be given to certain factors; for example, the paramountcy or primacy of welfare principle. Sometimes an even more complex situation may arise when two or more different approaches are being canvassed simultaneously.

1.36 It is worth noting that none of these approaches may be found in any statute. Nor are they mentioned in terms by the courts. The expressions have been used to

describe the function of the court, either implicitly in terms of the relevant legislation or generally in contemplation of the system as apparently conceived by the courts.

1.37 Since none of these approaches is the subject of direct legal prescription, they are legally valid only to the extent that they fall within the discretionary stage of the process. The exception to that proposition, if it is properly an exception, is the threshold approach. But that expression is used rather to describe the division into threshold and discretionary stages than to create a separate approach per se. Even so, there are discretionary aspects of the threshold stage of the process. The word "discretion" is taken to mean the existence of a choice between two or more alternatives. Any discretion may be circumscribed in various different ways. Even these restrictions are in some respects discretionary.

1.38 It is possible to identify at least four types of discretion. An applicational discretion arises when the decision-making body is determining whether a certain provision applies to an identified set of circumstances. This is a quite normal procedure. It is not a "legal" issue but it is part of the adjudicative and executive processes. If there is a problem about the meaning of any words or expressions in the provision, that raises the possibility of "interpretational discretion", especially

in relation to such words as "relevant", "appropriate", "reasonable", "interests" and "welfare" itself.

1.39 If the issue in question is merely whether a threshold requirement has been satisfied, then the solution of these applicational and interpretational problems ends the matter. It may be that the same or a different body is obliged to reach a decision on the merits or the substance of the dispute. For example, the child has been neglected by his parent: should he be received into care? Or, where the applicants are competent to adopt the child and the parent has agreed, should an adoption order be made? More controversially perhaps, where the mother has committed adultery, should custody be awarded to the father? The substantive or dispositional question is the last. It is more an administrative than an adjudicative issue. In either case it is fundamentally a discretion, whether the exercise of the discretion is limited or not. This is referred to as a substantive or dispositional discretion. The quality of the final decision in that case lies in the way in which it has been made. That is rarely regulated in any clear and concise fashion. If it were, it would scarcely be a discretion. No matter. The link between the circumstances of the case and the ultimate substantive decision is a rational process on the part of the decision-maker. The law does not govern rational processes in that sense. The discretionary element in that part of the process is

described as an intellectual or administrative discretion.

1.40 The expressions described in the preceding paragraphs are fundamental to this study. They are not all used at once nor in every context. The static part of the study sets the background to the dynamic part of the analysis and has little or no need for these special expressions. Even in the dynamic part they are used only gradually as the complexity of the legal system grows, culminating in the confusing context of custody and guardianship where, it is suggested, the terminology affords some benefit to the conceptual analysis of the system. The terms are much simpler than they may appear at first sight. There are three categories: aspects of welfare; the different approaches; the various types of discretion. The common denominator is a flexible structure and an absence of form: that is the nature of the system which they purport to describe.

CHAPTER 2

THE ROLE OF WELFARE IN THE LEGAL SYSTEM

Section 1 - Introduction

2.1 Although the preceding chapter discussed the purpose, nature, methodology and terminology of this study, it was impossible to exclude some of the ideas forming elements of the theme which this study hopes to establish. One of the remarkable features is the unity of structure, unity of approach and unity of substance of welfare in the law of children. This is particularly significant when the diverse origins and development of official care, adoption, custody and guardianship are considered. There has been an interaction between institutional principles and statute in Scotland and between common law, equity and statute in England. The legal structure is a carefully conceived blend of private law and public law. The influence of the United Kingdom Parliament, particularly since the mid 1850s, has been immense. But it took a long time indeed for that influence to be effective. The peculiar difficulty facing Parliament was to allow the circumstances of each case to dictate the decision and at the same time to guide the decision-makers in the direction along which Parliament wanted the system to develop. It was very much a running battle between Parliament and the courts for a hundred years or so. For only in the last decade may it be said with some justification that the contemporary

approach has become established.

2.2 The law relating to children may be analysed in a number of different ways. It could be treated as a simple statement or description of the series of propositions which constitute the corpus iuris; alternatively as a historical account of its development; or, more speculative, as a series of general principles deduced from the detailed rules and underlying the law; finally, most difficult of all, as a total jurisprudential doctrine evincing a concept of welfare which binds the propositions, principles and their development together as an organic legal unit. This study may be considered in any of these ways, separately or together. It is the specific purpose of this chapter to set out the total jurisprudential doctrine which emerges from the later detailed discussion of the law.

Section 2 - The historical evolution of current principles

2.3 Most modern text writers and commentators usually begin their discussion of the law no earlier than the middle of the nineteenth century. The development of the law is seen as either the waning of parental rights or the increasingly greater attention being paid to the welfare of the child.¹ In 1969 the House of Lords saw no need to examine the development of the law prior to 1848. That is understandable if the grundnorm of the legal system was the parental right to custody. That parental right was treated in that way by the courts in England and to a lesser extent in Scotland during the latter period of the

1 Para. 1.6.

nineteenth century and even for much of the twentieth century. Equally important, legislation was drafted on the basis of that same parental right; for example, the Acts dealing with industrial and reformatory schools, those affecting custody and guardianship and later the adoption legislation. Even today parental rights underly much of the legislation although the Children Act 1975² goes some way to restoring the idea of parental duty as part of the parent-child relationship in law.

2.4 It is true that for the last hundred and twenty years or so the parental right to custody has been the fundamental principle of the law. But where did that right come from? It is no accident that even today there is considerable dispute about custody as a concept within the law. The word was rarely if ever used in a legal context before and during the medieval period. The first time the word seems to have been used in legislation was in section 8 of the Tenures Abolition Act 1660³ which merely enabled an unmarried person to dispose by will of the "custody and tuition" of certain children under twenty one years of age. That provision did not create a parental right to custody nor did it make clear what custody was. The word has probably always meant some sort of relationship between the parent or substitute parent and the person of the child That per se does not create a right.

2 1975 c.72.

3 12 Car. 2, c.24.

2.5 Similarly the Scottish institutional writers did not write in terms of custody or a parental right to custody. The concept recognised by them was the patria potestas and that expression was used quite regularly until the law of Scotland became increasingly influenced by the law of England and the doctrine of parental rights in the late nineteenth century. Since then the parental right to custody has been the foundation of the law in both jurisdictions.

2.6 The directly relevant problem is not so much the parental right to custody but rather the relationship between it and the welfare and interests of the child. If the last fifty to a hundred years are seen as a waning of parental rights and a growing recognition of the welfare of the child, that, while true stricto sensu, is only a part of the development of current principles. It implies, for example, that prior to 1848 welfare was irrelevant and that the parental right to custody was the principal if not the only effective proposition of the law. If that is the implication, it is suggested, it is not justified. Does it matter? Not if the parental right to custody is consistent with the earlier law. But it is important if the parental rights doctrine formed no part of the earlier law.

2.7 The older law has often been accused of treating children as mere chattels or pieces of property. This may in some respects have been so but the political and social institutions of the feudal system provided not only for the protection of the property of children but also for

the care and protection of the person of the individual child. A guardian may be regarded as the holder of an office, almost a public office, whose function is to look after the child and his property. The guardian originally may have been more concerned with his ward's property than with his person and to that extent the system was ineffective. But the need for better enforcement techniques is altogether a different matter from legal doctrine. The medieval concept of guardianship was as much concerned with the child's person and hence his welfare as with his property. Guardianship was regarded principally as the source of duties owed to the child rather than as a series of rights in the parents.

2.8 Guardianship in Scotland had different detailed rules of legal regulation. But the same concept of duty was its foundation. In both jurisdictions a parent was regarded as a guardian for certain purposes. In that sense the parent as guardian owed the same duties to the child. It is thus intelligible why the Scottish institutional writers and even Blackstone stressed the duties of guardians and parent-guardians and made no mention of any right to custody. The law of Scotland acknowledged a modified form of the Roman patria potestas. This comprised more than ample powers for the parent-guardian to give effect to his duty to care for the child. But again it was not regarded as inter alia a parental

right to custody. That came later under English influence. Until that came about, a Scottish parent-guardian was something in the nature of an office-holder owing duties to the child and endowed with the necessary powers to give effect to these duties. If so, the parental interest in the child was fundamentally fiduciary and not personal to the parent.

2.9 The concept of the patria potestas never became established in England. Guardianship and parent-guardianship did not seem to develop. The withering-away of the feudal structures, growing urbanisation, the intervention of the State in the form of the Poor Law no doubt helped to break down the medieval family concept. People perhaps acquired different attitudes to their children, especially as an agrarian economy gave way to a commercial and then an industrial one. These tendencies were probably less significant in Scotland where the feudal institutions coupled with the Romanistic legal influence remained longer. This is historical and social speculation but it may explain why the family as a social unit changed more quickly in England than in Scotland. If this is so, then the feudal institutions of the law probably became obsolete for England by the eighteenth century. The concept of duty lacked any means of enforcement. There was a gap in the law as regards children within the family. That gap was quietly and unobtrusively filled by the parental right to custody during the eighteenth century.

2.10 The parental right to custody was probably never regarded by the law as absolute. But by the second half of the nineteenth century it had become very difficult indeed to justify suspending its operation by the parent. The parental rights doctrine was fortified by another creation of the nineteenth century, the parental control over the child's religious education, which together with the parental rights doctrine made the position of the parent almost absolute.

2.11 This was the background against which Parliament began to legislate in the nineteenth century. There was clearly some concern for the welfare of the child during the Victorian era, although it did not always emerge directly in the legislation. Some of the reforming legislation was inspired by private members and during most of the nineteenth century the government was obviously most reluctant to promote change. Equally it hesitated to be seen blocking change. To some extent the period from about 1850 to 1930 or 1940 was a conflict between Parliament and the courts. Parliament was attempting to extend the role of the legal system in children's matters and the courts were enforcing as far as possible the parental rights doctrine. The legislature was caught in a dilemma. The legislation could not be too specific; that would destroy the flexibility needed to deal with each case on its merits. But unlimited discretion would enable the courts to apply existing principles. That is what happened, for example, in the matrimonial context.

2.12 The use of the criminal sanction against parents had always been difficult, particularly in England, and the technique of more specific statutory offences for abuse of children was introduced towards the end of the century. This was not always successful, for the courts were still able to reduce the impact of the legislation by adopting an appropriate line of interpretation. The same was true to some extent of the legislation enabling children to be taken away from culpable parents. But the opportunity to implement this legislation probably did not fully arrive until 1908 when juvenile courts were for the first time set up. It is probably fair to conclude that the traditional courts felt compelled to give effect to the parental rights doctrine in all contexts, while Parliament hesitated to force the welfare doctrine in a total sense upon the system.

2.13 It is strange that two branches of the legal system were simultaneously giving effect to different basic principles. But the conflict appears to have been rather unreal. Only a limited group of persons had in practice access to the courts. Yet abuse of children was not limited to any one group in society. For practical reasons the judicial system was unable to help the social groups most in need of assistance. That is as much a question of political will and resources as of legal doctrine. This did not come about until 1948 when administrative intervention was extended. The argument is still raised, however, that a parent cannot be deprived of his rights except by order of

a court. But in practice, while still acknowledged, the argument is gradually being ignored.

2.14 What principle emerges from this brief historical preamble? Firstly, custody as a concept known to this law appeared late in the development of the English legal system, whence it later spread to Scotland, and then by some unknown legal process it became the foundation of the parental rights doctrine. That development enabled the legal system to become strictly and almost absolutely paternalistic by the middle of the nineteenth century. The courts favoured this paternalistic approach at the expense of moves by Parliament in a rather different direction.

2.15 Next, an examination of the earlier law indicates that legal doctrine supported a concept of guardianship couched in terms of parental duties rather than rights. The guardian or parent-guardian was endowed with the powers necessary to give effect to that duty. Conceivably custody could have developed in the same way but it did not do so. Guardianship as a fiduciary responsibility originated from a concept of welfare. This notion of fiduciary responsibility remained even during the era of the parental rights doctrine but the scope for its application was narrow. Procedural changes have in recent years in England widened the scope of its application again. Thus concern for the child and his property was the legal basis of the guardianship concept which remained in emasculated form while society created the doctrine

of parental rights which in its own turn has been modified by the restoration of a different form of the welfare concept.

2.16 The development may be put briefly in summary form:

- (a) Prior to the eighteenth century the welfare doctrine took the form of a duty placed upon guardians and parent-guardians and enforced by the feudal institutions recognised by the law.
- (b) During the nineteenth century the welfare doctrine was largely overshadowed by the doctrine of parental rights created and enforced directly by the judicial system.
- (c) The current system recognises a modified version of the parental rights doctrine and a much strengthened welfare doctrine enforced to some extent by administrative means even when the enforcement agency is a court.
- (d) The current system is thus a compromise of the potentially conflicting doctrines which preceded it. This, it is suggested, is the cause of the complex doctrinal and procedural difficulties of the present system.

Section 3 - The concept of authority

2.17 The recognition by the courts of custody effectively distorted the simple pattern of guardianship based on a regard for the interest of the child. If this is correct, it demonstrates one important principle: that the law generally speaking has not treated the parent-child relationship as an enforceable parental legal claim "to" the child coupled with a duty on the child to comply and a further duty on everyone else not to interfere. Rather the law simply creates an

authority over the child exercisable by certain persons or bodies in certain circumstances and in a certain way. Except during the Victorian era and to the extent that Victorian doctrines still influence the law, the law concerning children is not a matter of rights, parental or otherwise, enforceable or not. It is only a system enabling persons to make decisions relating to children. The law does not state absolutely or objectively what decisions must be made or not, as the case may be. Provision is made for the person competent to make the decision and how that decision should be made. Powers and processes are the indicia of the law of children; not rights and duties. It is thus a system of authorities.

2.18 This proposition is quite clear in relation to the feudal concept of guardianship with its sense of duty and fiduciary responsibility and its idea of a public office. It may even be applied to the Victorian idea of custody. Although in practice difficult, it was possible for a parent to be divested of custody. Since the parental right was always liable to removal, it could in a sense be regarded as an authority rather than as a right, even in the context of the private legal regime of children. The real difficulty with the Victorian system, which no doubt was intended to fortify parental authority so as to strengthen the family unit, was the practical incapacity of controlling the parental authority so created. It in effect became much more nearly

absolute than perhaps even medieval guardianship.

2.19 The pattern of authority has since been considerably modified. Further restrictions on the exercise of parental authority have been introduced but they are not generically different from earlier restrictions imposed during the nineteenth century. The modern approach has been to increase the number of authorities or potential authorities in competition for control of the child. The range is wide: natural parents, guardians, step-parents, foster parents, relatives, applicants for adoption, local authorities, juvenile courts, children's hearings, adoption agencies, voluntary and official caring bodies, even the courts themselves. Not that in every case each authority is competent. Most will not even be interested except in the special case. In other words the static legal relationship is sufficient in almost every instance. There is a conflict of authority only occasionally.

2.20 The doctrine of parental rights exerts an influence upon this system of authorities. It seems to give to parental authority a residual significance not afforded to any other authority. This is perhaps stating no more than that legislation assumes a parental right to custody, at least in the static sense. It may be more significant than that, for the courts, particularly in England, have from time to time created a presumption in favour of parental care which must be rebutted before the possibility of conferring authority

elsewhere arises. What is interesting is that this presumptive approach is often justified by reference to the welfare of the child.

2.21 Even where a parent is given a privileged position of authority, perhaps only as a threshold consideration, that does not mean that other authorities are incompetent. The present system thus provides the opportunity for greater conflict than the Victorian system. It also means that the position of a parent as a holder of one among a number of authorities is in a vastly different position from a parent with practically sole authority. The current parent-child relationship is much closer to its feudal counterpart than its Victorian analogue. It is probably odd indeed to think of a parent as a holder of an authority, almost like an office-bearer who is liable to be removed from office at any time. The administrative superstructure of the present system is quite different from anything in the feudal and pre-Victorian period but the idea of authority and of the parent as an office-holder with fiduciary responsibility towards the child is not inconsistent with the way the law has developed since 1948.

2.22 The policy of recent legislation has been not to destroy the concept of authority but to fragment it to an increasing extent. Even the earlier judicial system acknowledged a form of fragmentation, by permitting access to a non-custodial parent. But the law has become much more complicated.

Total authority over the child resides somewhere but so many persons, bodies and institutions may now be involved that to search for that total authority is unreal. It should be recalled, of course, that the parental rights doctrine remains valid in a static sense as indicating the parents jointly as the source of total authority. The resolution of conflicts in the exercise of authority, which is now what the legal system attempts to do, is the dynamic reality of the system. Sometimes this is regarded as an exercise in legal pathology but it is more than that. For the legal system creates as well as regulates relationships. The actual parent-child relationship creates the legal parent-child relationship until some change takes place. Adoption, for example, is the process whereby a new legal relationship is substituted for an existing one. So, although the process is dynamic, it creates a novel status for the parties involved. It is less accurate to ascribe this pattern to the relationship created when a child is in the care of a local authority. The local authority has in a sense a statutory status but it involves the parents as well as the child; an example therefore of a more complex fragmentation of authority. The reason why Parliament has legislated in this complex fashion is to preserve as much of the parental rights doctrine as is possible without sacrificing the aim of protecting and promoting the welfare of the child. This compromise permeates the whole operation of the law.

2.23 There is probably no better example of this twofold

approach than the law of adoption. It seeks to protect the interests of the natural parents by incorporating their agreement to the proposed adoption. At the same time the system safeguards the position of the child. Yet neither interest is absolute. Parental agreement is liable to dispensation and no applicant for adoption has a right to adopt any child or the child in question. Nor can a child insist upon adoption. The same is true, but in more complex fashion, of official care. So too of custody and guardianship. Each of the various contexts exhibits this duality of approach: dealing with parental interests and identifying the interests of the child. Often they are examined in that order, especially by the courts, and for reasons which are often probably historical only. This is the origin of the adjudicative and administrative or threshold and discretionary stages of the various processes. They are concerned respectively with the existence and exercise of authority.

Section 4 - The function of the legal system

(a) The creation of authority

2.24 The legal system has two functions: it either recognises or creates decision-making persons or bodies; and it indicates how such authority should be exercised. The common law of England and the institutional principles of Scots law recognised the authority of parents and guardians. The subsequent legislation has been drafted on that basis and almost every other authority has been created by statute.

Certain authorities may have been confirmed rather than created by legislation and in other contexts the influence of the legislation has been less than direct. These functions are exercisable either by courts or executive bodies, in the sense that a court may confer authority by awarding custody or access, by making an adoption order or by committing the child to the care of the local authority; a children's hearing by making a supervision requirement in relation to the child; a local authority by receiving him into care or assuming parental rights in respect of him. These authorities are created against the background of the doctrine of parental rights and the authority of the parent is attenuated to the extent that authority is thereby conferred upon that other person or body.

2.25 These decisions on the one hand either confirm or deny the authority of the parent pro tanto and from the other point of view either deny or confirm the authority of the other competing person or body. This is true in the application of the common law, equity or statute and in each different context. Welfare plays some part in these processes. If the quality of parental care is in issue, the welfare of the child is relevant only in a negative sense. The decision-maker is concerned principally with the conduct of the parent and by implication only with the effect of that conduct on the child. The tendency however is for the threshold requirements or criteria to reflect increasingly the interests of the child, a policy largely brought about by legislation. This is true

of adoption and official care. The position in custody and guardianship is much the same but it has evolved judicially but probably under the influence of the associated but strictly irrelevant legislation.

2.26 Custody evolved from guardianship but the consequential concept was altogether different. Nevertheless just as a guardian could be removed from office, so a custodial parent could be suspended in the exercise of his right of custody. The grounds for suspension were very narrow at common law, while equity was probably more sympathetic to the wider interests of the child. But in either case the court adopted a threshold approach by treating the grounds as requirements to be satisfied before the suspension of parental rights could even be contemplated. Where there were no parental rights to indicate such an approach, as in the case of an orphan, the threshold stage was unnecessary and a more open approach possible. It has only been in relatively recent years that the threshold stage has been to some extent bypassed. What is particularly significant is the similarity of approach adopted by the courts and that dictated by Parliament.

(b) The exercise of authority

2.27 So much for the first, mainly adjudicative, function of the legal system. It considers in terms of past behaviour and conduct whether the holder of an authority over the child has disqualified himself from continuing to exercise that authority. Welfare plays at most a negative role and usually

identified in specific rather than general terms. The second function of the legal system indicates how authorities should be exercised. Again the clearest examples are to be found in the official care legislation. There are two distinct aspects of legal control over the exercise of authority over a child. The first relates to changing the static condition of the child. That is itself a dynamic process. The question is, once the threshold requirements have been satisfied, whether some inroad should be made into the exercise by parents of their authority. More technically, using Scotland as the example, once it has been decided that a child may be in need of compulsory measures of care, the issue is whether the child needs such care and, if so, what course is in the best interests of the child. That may involve making a supervision requirement which involves an adjustment of legal authority in relation to the child. Welfare then plays an important, probably vital, part in determining where authority over the child should lie. That is very much a positive question, coloured by issues of policy and individual circumstance.

2.28 Adoption provides another example. Having applied the threshold requirements regarding the competency of the application, the court has to decide whether or not to grant an adoption order. In practice courts rely heavily upon the information provided by the supporting administrative services but the legal responsibility whether to transfer legal authority over the child is firmly theirs. The dispensation process

which itself operates within the adoption process may be similarly analysed. Once the threshold requirements for dispensing with parental agreement have been met, the court comes under an obligation to decide whether or not to dispense with agreement. The welfare of the child plays a part in all of these decisions.

2.29 These decisions change the static condition of the child. But the exercise of authority so confirmed, recognised or created is also liable to regulation. Once a child is in the care of a local authority; where a child has been put on probation; when a child is in a community home or a residential establishment; if a child is being cared for by official foster parents; in all of these cases the relationship between the child and the holder of the authority is governed by the relevant legislation. Whether the word "status" is appropriate or not in relation to such statutory guardians, the authority of these guardians is set out in the legislation and effectively reduces pro tanto, and in some cases eliminates, the authority of the parent. The making of an adoption order has much the same effect but the consequences are more profound and more permanent.

2.30 Custody fits into a similar pattern. But that pattern is more complex because of the interaction between the common law and statute. The status of parent and child was created by the common law and extended in 1973 to equalise the rights

of both parents.⁴ Over the years the courts in both Scotland and England created a series of requirements enabling them to interfere with the exercise of these parental rights. Welfare as such was never really a ground of intervention. The process, at least before the twentieth century, was almost entirely adjudicative in nature. Satisfaction of these threshold requirements per se operated to suspend the parental right to custody and the competitor for authority normally succeeded. There was little discussion on the question where the child's best interest lay, except in the absence, physically or legally, of parental rights.

2.31 Parliamentary intervention, though no doubt desirable, made the matter more complex. The legislature intervened by making welfare an administrative consideration in a judicial process which had hitherto been almost totally adjudicative. The contemporary law probably does not directly indicate how a parent should exercise his authority. This is the consequence of the parental rights doctrine, compared with the earlier situation which could be regarded as a recognition of the fiduciary basis of the exercise of parental authority. Parliament intervened not to direct how a parent should exercise his powers but to indicate how a court should exercise its supervisory authority over children. This is why the courts face the dilemma of parental rights on the one hand and the child's welfare on the other hand: in other words, the

⁴ Guardianship Act 1973 (1973 c.29).

compromise of policy mentioned earlier.

(c) The approach to welfare

2.32 In practical terms the simplicity of the adjudicative function of the courts, tied to rights and the enforcement of rights, was confused by the complexity of the administrative function conferred upon the courts, related to interests and the resolution of conflicting interests. That being so, as Willmer L.J. implied in 1966, the function of the legal system is restricted to indicting the approach to be adopted to the resolution of such conflicts.⁵ Although welfare plays different roles at different stages of the official care and adoption processes, the legislation has indicated quite clearly the division into the threshold and discretionary stages. Generally the custody and guardianship legislation has been drafted differently but its operation by the courts suggests a similar division into the threshold and discretionary stages. The confusion in this context has been created by the much closer interaction between the two stages in custodial disputes than in official care and adoption issues. This is partly because of the nature of the Parliamentary intervention, partly because the courts sometimes act adjudicatively and sometimes executively and partly because of the historical evolution of the relevant principles.

2.33 It cannot be said that in contemporary practice the

5 Re C(MA)(an infant) [1966] 1 All E.R. 838 at p. 853 per Willmer L.J.

courts in England have adopted a uniform approach. The Scottish courts have perhaps been more consistent in recent years. The courts in both jurisdictions have been somewhat reluctant to exercise a discretion in relation to the circumstances of the individual case and they have turned to principles, maxims, presumptions and similar guidelines to assist in their decision-making processes. There is much less evidence of this in the adoption process where the legislation is more precise and in which administrative support is a part of the process and also in the official care context where the role of the higher courts is more supervisory than executive.

2.34 It is possible to discern four broad approaches adopted from time to time by the courts in the resolution of these conflicts. Many of the earlier judgments distinguished between the threshold stage and the discretionary stage of the process. The threshold stage operates either to deprive a person, usually a parent but sometimes a guardian, of a right conceded to him by the law or to disqualify him from exercising that right either temporarily or permanently. The consequence of such a decision at the threshold stage is to remove that person's authority in contemplation of its exercise either de iure or de facto by a substitute. If a new legal authority is created, that decision is taken at the discretionary stage of the process. For example, a father may have so conducted himself that he is no longer fit to have custody which is consequently conferred upon the mother. Or a juvenile court

may decide that inter alia the parent has ill-treated the child and then decides to commit the child to the care of the local authority.

2.35 During the nineteenth century the threshold stage more often than not concerned a recognised legal right. One of the principal developments of English law in particular was the judicial tendency to substitute a principle of child care for a legal right as the threshold element. Sometimes this is referred to as the modified threshold approach or the presumptive approach. The distinction is whether the principle is introduced at the commencement or at the conclusion of the argument. In either case the principle is not a matter of law but at best a creation of the judicial imagination. It is simply a guideline to assist the court in reaching its decision at the discretionary stage. More often than not, the principle is justified in terms of the welfare doctrine: for example, that it is better for a young child to be with his or her mother or that a child is better to remain where he or she is rather than risk a change. This emphasises that the presumptive approach and its justification are largely within the discretion of the judiciary.

2.36 This is not true of the subsumptive approach. This view has proved more popular with the Scottish courts, probably because it may be justified in terms of section 1 of the Guardianship of Infants Act 1925.⁶ The Scottish courts, it

6 15 and 16 Geo. 5, c.45.

will appear, have been more faithful to the legislation than their English counterparts. The subsumptive approach acknowledges that the legal system does not sacrifice everything to the welfare doctrine but it does give some meaning to the concept of paramountcy. This approach does not limit what may be relevantly considered in reaching the decision. It simply requires each factor to be considered from the point of view of the child's welfare. That is the widest aspect of the approach. Section 1 of the 1925 Act effectively limits the subsumptive approach to parental claims of superiority.⁷ That is not an important limitation in practice for the legal system effectively is a means for settling competitions between parental claims and the claims of the welfare doctrine.

2.37 The contemporary law is based essentially upon the balance approach. This recognises that all relevant factors should be taken into account. Even if the welfare of the child is not specifically mentioned in the legislation, it would normally be taken into account. There is no reason to believe that this is an invalid approach. But sometimes the legislation requires welfare to be included in the decision-making process and occasionally a special priority is afforded to the welfare of the child. Neither directive undermines the need to achieve a balance; it simply indicates pro tanto how that balance is to be achieved. Thus, whether or not the balance is statutorily weighted, this approach contains

7 Para. 35.90.

the most open and unrestricted discretions of all the identifiable attitudes. In practice, although the courts often formally acknowledge their balancing function, they frequently modify it in fact by annexing the presumptive approach to it. Each aspect of the present system is thus flexible in essence.

(d) The role of welfare

2.38 Although the balance approach, which permeates the current law, is flexible, welfare plays a number of different roles in such a discretionary system. If welfare is relevant at the threshold stage, it operates only negatively. The child's welfare is relevant only as the object of the parental conduct which forms the basis of the threshold requirement. At the discretionary stage welfare may operate positively as well as negatively. The fundamental question is whether welfare is part of the decision-making process or whether it stands outside or beyond the process. Generally welfare is regarded as part of the process. There are several possibilities. The welfare of the child may not be legally relevant, in the sense that the legislation confers an open discretion. Even so, the courts have frequently introduced welfare and related factors into the process, perhaps even as the policy implicit in the whole system.

2.39 If welfare is of direct legal relevance, it may operate within the decision-making process in four ways. The courts or the legislature may insist that welfare shall form

part of the decision: in other words, a factor in the balance approach. The next step is for welfare to be given a certain weight or priority in the process. Statute has created the principles of the primacy of welfare and the paramountcy of welfare. One of the problems is the distinction, if any, between the two principles. Clearly in either situation welfare is not the only consideration. If it were, it would scarcely be a consideration; it would stand outside the process. It has however from time to time been described as "overriding" or even "decisive". Assuming that these descriptions purport to retain welfare as part of the process, they probably mean no more than that welfare, as Lord MacDermott said, "determines the course to be followed".⁸ The decision-maker thus sets out on the rationalisation process with the intention of giving effect to the welfare of the child rather than employ the welfare of the child as a factor of last resort. Occasionally the approach is described so as to give the impression that welfare falls outside the process. But the general trends are against such a view.

2.40 These generalised distinctions are something of an oversimplification. In practice it may be misleading to separate the role of welfare in the discretionary processes from the overall approach to the decision-making as conceived by the courts. The authority may, for example, adopt two or more approaches at the same time and welfare may play several

⁸ J v C [1970] A.C. 668 at p.711.

roles in one or more of these approaches. Each situation needs to be analysed separately. The custodial context is the most complex and yet the most illuminating in respect of these generalisations. But they are valid also in relation to adoption and official care. Statute has intervened more directly in these two areas and the courts have had less opportunity to construct complicated models for welfare than in custody issues. The emphasis in the adoption and official care legislation has been on the threshold stage of the process. But overall the pattern in the three main areas of substantive law is consistent and coherent. This unity of approach is quite remarkable.

(e) The nature of welfare

2.41 Finally, what of the nature of welfare? Where Parliament has enacted specific components of welfare, for example, health, accommodation or education, the legal issues are mostly related to application. But when the expression "welfare" or "interests" is used, that injects a greater degree of discretion of various kinds into the process. The simple use of these more general expressions gives to the courts an opportunity to adopt a creative role. The English courts in particular have from time to time accepted this challenge and in so doing have considerably extended the substance of welfare to include not only the traditional elements of physical and moral well-being but also the viability of relationships and notions of psychological risk and security. This has come about partly by judicial

initiative and partly by the ancillary policies enacted by Parliament of providing the relevant information, of relaxing certain rules of procedure and of extending the range of sources of care for the child in question. Without these ancillary provisions, the doctrine of welfare would in practice be devoid of real meaning and effect.

2.42 The substance of welfare is closely related to the structural aspects of the legal system which provide the relevant approaches and authorise the most appropriate discretions. Welfare, of course, is a part of these approaches and discretions. In that sense welfare is of direct legal consequence. But, although the part played by welfare within the legal system is a matter of law, the welfare of the individual child is a matter of fact, not of law. It is moreover a fact in at least two senses. Once the relevant decision-making body has decided what is best for the child or where his welfare lies or whatever language is used, that decision becomes a fact within the legal system and thus a fact to which the law attaches a series of consequences. Most of this analysis is concerned to examine these consequences. Such a decision is a fact in another sense. It represents the judgement of the decision-maker on what the child's welfare requires. This is a consequence, itself not a legal matter, of all the circumstances affecting the child. In other words, this judgment is the substantive decision for the child's future. It is not a matter of legal expertise. But the function of that judgment is a matter of law.



2.43 These are important distinctions. Welfare as a fact relates to the individual child; welfare as a matter of law indicates the part played by that fact in the legal system without reference to the individual child. But this distinction breaks down to some extent when the law provides that the welfare of the individual child plays whatever role the welfare of the individual child rather than the legal system indicates. The recognised approach closest to that objective is the balance approach tempered by the paramountcy of welfare principle. But the stage has not been reached which treats individual welfare alone without reference to its legal context. Once that stage is reached, the role of the legal system would for all practical purposes have disappeared. Welfare would then become a fact related only to the individual child and, for that reason, alone binding in the legal sense. Whether Parliament intended to bring that about or not, the courts have striven successfully to avoid reducing the role of the legal system to nil.

CHAPTER 3THE OBJECTIVE TREATMENT OF WELFARESection 1 - Classification: general(a) Introduction

3.1 Almost every judicial or administrative decision dealing with children is likely to be affected in one way or another by an enactment of Parliament. The current legislation is extensive and complex. Welfare plays a very large part in these statutory schemes, either directly as an item generally or specifically written into the legislation or indirectly as an aspect of the policy underlying the enactment. Welfare as a matter of policy is legally irrelevant except only in certain circumstances as an aid to interpretation. But welfare and its derivatives are so frequently of such direct legal relevance that, before the dynamic effects of the legislation are examined, an attempt may be made to gather together the many statutory provisions bearing upon welfare and to identify any possible heads of classification.

3.2 This is, to say the least, a rather challenging task. It is important in itself so far as it discloses the current statutory patterns. It is also important not only as a foundation for an examination of the individual provisions in their own context but even as a statutory model against which the approach of the courts to the welfare doctrine may be compared. This is particularly illuminating, it is suggested, for the overall pattern

created by Parliament is in many respects fundamentally similar to the approaches devised by the courts. No doubt an interaction between the judicial and legislative functions has occurred, probably sub silentio. Nevertheless the underlying similarity is quite remarkable.

(b) Policy

3.3 To begin with matters of policy: legislative policy, particularly the protection of children, may be relevant to the interpretation of the statute in question.¹ Normally that applies to the construction of a word or a phrase. To use that device, it may be necessary to identify the objective of the whole or part of the statute in addition to the objective of the relevant provision. These objectives may relate to the welfare of the child either directly or by some oblique method. The welfare of the child may be governed, for example, by legislation which does not refer to welfare as such. For that reason the use of the several² interpretational techniques may prove useful in ensuring a construction of the statute consistent with its objective. Otherwise policy may be sacrificed in the name of legalism. On the other hand statutes may include within their provisions references to welfare as such. It is likely that such provisions would be drafted in more discretionary form: firstly, the word "welfare" itself is sufficiently imprecise to permit a certain amount of interpretational discretion; secondly, welfare may be a factor relevant to the fulfilment of a statutory function. In that event problems of

1 Chapter 8.

2 Chapter 10.

interpretation will remain and policy may even in that context prove helpful in solving such problems. Thus policy has a significant part to play and welfare as a policy supported by Parliament has a multi-functional role in the overall system. It is the purpose of this Part to identify these functions.

(c) Welfare models

3.4 Legislative policy as such, even in the context of children, is not a matter with which the courts are normally concerned. But they are very much concerned with the specific provisions of statutes affecting welfare. There are several different approaches to this question and the role of the concept of welfare varies accordingly. Some deal with welfare as a general concept; others are based upon specific factors obviously related to welfare. Some are enforced by means of criminal sanctions; others are found in an administrative structure. Some operate in a positive direction; others negatively. Many provisions in the legislation are simple prescriptive canons which cannot be classified in any real sense. Nevertheless it is possible to discern several trends in the legislation purely on the basis of the language used and without reference to judicial authority. Such an analysis suffers from being static; the dynamic effect will be considered later.

3.5 The statutory rules affecting the welfare of children are to be found firstly in a wide range of statutes

which are frequently amorphous and unrelated and also in the appropriate statutory instruments.³ Some statutes also apply to persons other than children.⁴ Even within any one statute the provisions may similarly lack logical form and cohesion.⁵ Certain provisions may regulate matters not necessarily consistent with the welfare of the child.⁶ Their presence in the statute emphasises that legislation affecting children is largely a balance between the interests of the children on the one hand and the interests and sometimes the rights of parents on the other hand, while interested third parties are often required or empowered to exercise various functions affecting the parent-child relationship.

3.6 The classification of welfare as a statutory concept must be approached with caution. If it is made too rigid, it will break down. Even if a flexible view is taken a certain structural coherence appears through the mass of legislative rules. This, it is suggested, is helpful to an understanding of welfare, even if it lacks absolute

3 E.g. The children and young persons legislation; adoption legislation; guardianship legislation; matrimonial and consistorial legislation; education legislation; legislation affecting the treatment of offenders.

4 E.g. the Criminal Justice Acts.

5 Particularly some aspects of the children and young persons legislation: cf. the adoption legislation.

6 E.g. where rights are conferred upon third parties, as in adoption legislation; or where some other interest is recognised, for example, that of other inmates in an institution or that of the public at large.

precision. Its significance lies in the pattern disclosed across the whole range of legislation. This emphasises the distinctive uses of welfare within each separate piece of legislation.

3.7 As may be expected, there are many ways of classifying welfare and its use in statutes. For example, the basis could be content: it could be the objective of the provision. None of these has been adopted. The approach used, one which is intrinsically more complex, is to classify welfare according to the function which it appears to perform in the statute. For example, if welfare is articulated in the Act, does it operate as a requirement to be satisfied before a court or other body may competently exercise a power or is it the goal to which the court or other body is directed when exercising such a power? On the other hand if welfare as such is not articulated but is nevertheless involved, is the behaviour objectively prescribed or is there an element of discretion? These questions appear vague and complicated. The essence of the classification however is simple. Welfare operates as a gradation from provisions which objectively secure welfare in direct terms, through provisions which use welfare as a concept of growing generality in the exercise of statutory functions conferred upon various bodies, to provisions which are intended in indirect ways to advance the interests of children.

3.8 Several different expressions are used in the legislation to convey the concept of welfare. That word itself is probably the most common. There are others: for example, interests, best interests, benefit, well-being or advantage. These words are used in a relatively positive sense. Detriment and prejudice are used more negatively. It is not suggested that these words are synonymous. Clearly they are not. There are differences of degree and emphasis. But any reference here to welfare includes whichever expression is used generally to describe the concept in question. Nor is it suggested that the expressions have been used synonymously by Parliament. The draftsman may seem to have used them in a rather haphazard fashion, for it is difficult, probably impossible, to discern any rational use of the various words. This present classification pays no regard to these differences. They will be more significant in the subsequent dynamic analysis of the welfare concept.

Section 2 - Objective welfare treated directly

(a) Table 1

3.9 This chapter considers in detail the enactments which deal with aspects of a child's welfare which may be regulated by the law either directly or in terms of a function created by statute. The first set of provisions to be considered comprises rules which directly and objectively set standards which bear upon the welfare of

children. They are set out in the following Table. The contents of this or any other Table are not intended necessarily to be comprehensive but they indicate typically the provisions in question and include the most significant rules. It is a feature of this Table and of the other Table in this chapter that the word "welfare" and similar expressions are not used. The reason is that such words are too general to treat the subject objectively.

TABLE 1

OBJECTIVE WELFARE TREATED DIRECTLY

Part 1 - Provisions of Acts of Parliament

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
<u>Offences against the Person Act 1861 (24 & 25 Vict., c.100):Eng.</u>		
1861 s.27	Prohibition against unlawfully abandoning or exposing any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured.	Criminal proceedings

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
1861 s.56	Prohibition against unlawfully, either by force or fraud, leading or taking away, or decoying or enticing away or detaining, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other persons having the lawful care or charge of such child or the possession of such child; and against with any such intent, receiving or harbouring any such child, knowing the same to have been by force or fraud, led, taken, decoyed, enticed away, or detained.	Criminal Proceedings
<u>Custody of Children Act 1891 (54 & 55 Vic., c.3) : G.B.</u>		
1891 s.1	Parental abandonment, desertion or misconduct as ground for refusal to enforce parental rights.	Civil Proceedings
1891 s.3	Parental abandonment, desertion or excessive delegation as ground for refusal to enforce parental rights.	Civil Proceedings

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
<u>Infant Life (Preservation) Act 1929 (19 & 20 Geo.5, c.34): Eng.</u>		
1929 s.1(1)	Prohibition of child destruction (i.e., where a person, with intent to destroy the life of a child capable of being born alive, by any wilful act causing a child to die before it has an existence independent of its mother).	Criminal proceedings
<u>Children and Young Persons Act 1933 (23 & 24 Geo.5,c.12):Eng.</u>		
<u>Children and Young Persons (Scotland) Act 1937 (1 Edw.8 & 1 Geo.6, c.37): Scot.</u>		
1933 s.1(1)	Prohibition of cruelty to	Criminal
1937 s.12(1)	persons under 16 (assault, ill-treatment, neglect, abandonment, exposure) at instance of certain persons.	proceedings
1933 s.3(1)	Prohibition against allowing	Criminal
1937 s.14(1)	persons under 16 to be in brothels.	proceedings
1933 s.4(1)	Prohibition against causing or	Criminal
1937 s.15(1)	allowing persons under 16 to be used for begging.	proceedings

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
1937 s.13(1)	Prohibition against causing or encouraging the seduction, unlawful carnal knowledge, prostitution of or the commission of an indecent offence upon a girl under 16.	Criminal Proceedings
1933 s.5	Prohibition against giving	Criminal
1937 s.16	intoxicating liquor to children under 5.	Proceedings
1933 s.7(1)	Prohibition of sale of	Criminal
1937 s.18(1)	tobacco to persons under 16.	Proceedings
1937 s.20(1)	Prohibition against purchasing old metals from persons under 16.	Criminal Proceedings
1933 s.11	Prohibition against exposing	Criminal
1937 s.22	children under 12 (under 7 in Scotland) to risk of burning.	Proceedings
1933 s.18(1)	Restrictions on employment	Criminal
1937 s.28(1)	of children.	Proceedings (against employer)

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
1933 s.20(1) and (3)	Prohibition against street trading by persons under 17 (under 18 on Sunday).	Criminal Proceedings
1937 s.39(1) and (2)		
1933 s.23	Prohibition against persons under 16 taking part in performances endangering life or limb.	Criminal Proceedings
1937 s.33		

Infanticide Act 1938 (1 & 2 Geo.6, c.36) : Eng.

1938 s.1(1)	Prohibition of infanticide (i.e. where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child).	Criminal Proceedings
-------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
<u>Education Act 1944 (7 & 8 Geo.6, c.31) : Eng.</u>		
<u>Education (Scotland) Act 1962 (10 & 11 Eliz.2, c.47):Scot.</u>		
1944 s.39(1)	Duty placed upon parents to	Criminal
1962 s.35(1)	secure regular attendance at school of registered pupils.	Proceedings
1944 s.54(6)	Prohibition against person	Criminal
1962 s.61(5)	or clothing of pupil (after first cleansing) being found to be infested with vermin or in foul condition due to parental neglect while in attendance at school).	Proceedings
<u>Children Act 1948 (11 & 12 Geo.6, c.43):Eng.</u>		
<u>Social Work (Scotland) Act 1968 (1968 c.49):Scot.</u>		
1948 s.1(1) (a)	Absence of or abandonment of child by parent or guardian.	Administrative decision of local authority.
1968 s.15(1) (a)		
1948 s.1(1) (b)	Incapacity of parent or guardian.	Administrative decision of local authority.
1968s.15(1) (b)		

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
1948 s.2(1) (b)	Abandonment of child by parent or guardian;	Administrative decision of local
1968 s.16(1) (b)	incapacity or unfitness of parent or guardian.	authority.

National Assistance Act 1948 (11 & 12 Geo.6, c.29): G.B.

1948 s.51(1)	Persistent refusal or neglect to maintain.	Criminal proceedings.
--------------	-----------------------------------------------	--------------------------

Children and Young Persons (Harmful Publications) Act 1955
(3 & 4 Eliz.2, c.28) : G.B.

1955 s.2(1)	Prohibition against printing, publishing, selling or letting on hire any relevant work likely to fall into the hands of children or young persons.	Criminal Proceedings
1955 s.4	Prohibition of the importation of works to which the Act applies.	Criminal Proceedings

Sexual Offences Act 1956 (4 & 5 Eliz.2, c.69) : Eng.

Criminal Law Amendment Act 1885 (48 & 49 Vict., c.69) : Scot.

1956 s.5	Prohibition against a man	Criminal
1885 s.4	having unlawful sexual intercourse with a girl under the age of thirteen.	Proceedings

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
1956 s.6(1)	Prohibition subject to	Criminal
1885 s.5(1)	certain exceptions against a man having unlawful sexual intercourse with a girl under the age of sixteen.	Proceedings
1956 s.19(1)	Prohibition subject to one	Criminal
1885 s.7	exception against taking an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man.	Proceedings
1956 s.20(1)	Prohibition against a person acting without lawful authority or excuse taking an unmarried girl under the age of sixteen out of the possession of her parent or guardian against his will.	Criminal Proceedings

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
1956 s.23(1)	Prohibition against procuring	Criminal
1885 s.2(1)	a girl under the age of twenty one to have sexual intercourse in any part of the world with a third person.	Proceedings
1956 s.25	Prohibition against a person	Criminal
1885 s.6(1)	who is the owner or occupier of any premises, or who has, or acts or assists in, the management or control of any premises, inducing or knowingly suffering a girl under the age of thirteen to resort to or be on those premises for the purposes of having unlawful sexual intercourse with men or with a particular man.	Proceedings
1956 s.26	Prohibition against a person	Criminal
1885 s.6(2)	who is the owner or occupier of any premises, or who has, or acts or assists in, the management or control of any premises, inducing or knowingly suffering a girl	Proceedings

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
1956 s.26 (Continued)	under the age of sixteen, to resort to or to be on those premises for the purpose of having unlawful sexual intercourse with men or with a particular man.	
1956 s.28(1)	Prohibition against causing or encouraging the prostitution of, or the commission of unlawful sexual intercourse with, or of an indecent assault on, a girl under the age of sixteen for whom he is responsible.	Criminal Proceedings
<u>Affiliation Proceedings Act 1957 (5 & 6 Eliz. 2, c.55) : Eng.</u>		
1957 s.11(b)	Prohibition against withholding proper nourishment from or otherwise abusing or maltreating an illegitimate child on the part of a person appointed judicially to have his custody.	Criminal Proceedings

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
<u>Adoption Act 1958 (7 Eliz.2, c.5) : G.B.</u>		
1958 s.43(1)	Unfitness of custodian, or detrimental environment as ground for removal of "protected" child from unsuitable surroundings.	Civil Proceedings
<u>Licensing (Scotland) Act 1959 (7 & 8 Eliz.2, c.51) : Scot.</u>		
<u>Licensing Act 1964 (1964 c.26) : Eng.</u>		
1959 s.143(1) and (3).	Prohibition against allowing, causing or procuring persons under 14 to be in the bar of licensed premises during permitted hours.	Criminal Proceedings
1964 s.168(1) and (2)		
1959 s.144(1)	Prohibition of the employ-	Criminal Proceedings
1964 s.170(1)	ment of persons under 18 in the bar of licensed premises.	
1959 ss.145 and 146	Prohibition against selling, allowing the consumption of	Criminal Proceedings
1964 s.169(1) to (3)	or sale, consuming or buying of intoxicating liquor to, by or for persons under 18.	
<u>Betting, Gaming and Lotteries Act 1963 (1963 c.2) : G.B.</u>		
1963 s.21(1)	Prohibition against betting with or through a young person or employing a young person in the effecting of any betting transaction.	Criminal Proceedings

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
1963 s.22(1)	Prohibition against sending or causing to be sent to a person known to be under the age of 18 any betting circular.	Criminal Proceedings

Ministry of Social Security Act 1966 (1966 c.20): G.B.

1966 s.30	Persistent refusal or neglect to maintain.	Criminal Proceedings
-----------	--------------------------------------------	----------------------

Abortion Act 1967 (1967 c.87) : G.B.

1967 s.1(1) (a)	Not abortion if the continuance of the pregnancy would involve risk of injury to the physical or mental health of any existing children of the family of the pregnant woman greater than if the pregnancy were not terminated.	Defence to Criminal Proceedings
1967 s.1(1) (b)	Not abortion if there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.	Defence to Criminal Proceedings

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
<u>Children and Young Persons Act 1969 (1969 c.54) : Eng.</u>		
<u>Social Work (Scotland) Act 1968 (1968 c.49) : Scot.</u>		
1969 s.1(2) (a) and (c)	Prevention of proper development, impairment of health, ill-treatment of child or exposure to moral danger as ground for care proceedings.	Civil Proceedings
1968 s.32(2) (b) and (c)	Bad association, exposure to moral danger, unnecessary suffering, impairment of health or development as ground for compulsory measures of care.	Children's hearing proceedings
<u>Tattooing of Minors Act 1969 (1969 c.24) : G.B.</u>		
1969 s.1	Prohibition of the tattooing of persons under the age of 18 except for medical reasons.	Criminal Proceedings
<u>Children Act 1975 (1975 c.72) : Scot.</u>		
<u>Adoption Act 1976 (1976 c.36) : Eng.</u>		
1975 s.10(1)	Adoption by major married couple.	Civil Proceedings
1976 s.14(1)		

<u>Section</u>	<u>Provision</u>	<u>Means of Enforcement</u>
1975 s.11(1)	Age and status of applicant	Civil Proceedings
1976 s.15(1)	for adoption.	
1975 s.12(2)	Parental absence or	Civil Proceedings
1976 s.16(2)	incapacity, persistent parental failure, abandonment, neglect, persistent or serious ill-treatment as a ground for dispensation with agreement.	

Part 2 - Provisions of Statutory Instruments

<u>Rule or Regulation</u>	<u>Provision</u>
<u>Approved School Rules 1933 (S.R. & O. 1933 No.774) : Eng.</u>	
1933 r.23	Separate bed and suitable clothing for each boy.
1933 r.24	Sufficiency and variety of food and diet.
1933 r.28	Restriction upon employment of boys in school.
1933 rr. 30	Adequate provision for free time and recreation.

Rule or
RegulationProvision

1933 rr. 34 to 36 Restrictions upon methods of punishment.

1933 r.44 (1) Provision of medical, hygienic, and
(a) (d) and (e) dietary examinations and inspections.

1933 r.45(1) Provision of dental services.

Remand Home Rules 1939 (S.R. & O. 1939 No.12) : Eng.

1939 r.3 Separation of boys likely to exercise
bad influence over others.

1939 r.4 Separation of girls from boys; separate
sleeping accommodation.

1939 r.5 Separate bed for each boy.

1939 r.6 Sufficient and varied food.

1939 r.7 Suitability of clothing.

1939 r.8 Cleanliness; medical examination.

1939 rr.14 and 15 Restrictions upon methods of punishment.

1939 r.16 Prohibition of corporal punishment
for girls.

1939 r.19 Dispensation with consent of parent
or guardian to operative treatment.

Rule or
Regulation

Provision

Approved Probation Hostel and Home Rules 1949 (S.I. 1949
No.1376) : Eng.

1949 r.17	Separate bed and suitable clothing.
1949 r.18	Sufficient and varied food.
1949 r.23	Adequate provision for free time and recreation.
1949 r.28	Prohibition of corporal punishment.

Borstal (Scotland) Rules (S.I. 1950 No.1944) : Scot.
Borstal Rules 1964 (S.I. 1964 No.387) : Eng.

1950 r.10 1964 r.25	Detailed requirements of sleeping accommodation; size, light, heating, ventilation, capacity of a dormitory.
1964 r.11(1)	Separation of male and female inmates.
1950 r.11 1964 r.26	Separate bed and adequate bedding.
1950 r.42(1) 1964 r.24(1)	Prohibition of excisable (intoxicating in England) liquor except for medical reasons.
1950 r.42(2) 1964 r.24(2)	Restrictions upon smoking.

Rule or
RegulationProvision

1950 r.66(1)
1964 r.19(1)

Care of health of inmates.

1950 r.76

Provision of dental treatment.

1950 r.80
1964 r.27(2)
and (3)

Washing, shaving and hair cutting.

1950 r.81
1964 r.27(1)

Provision of toilet articles.

1950 r.83
1964 r.23(3)

Quality of food.

1950 r.87
1964 r.22(1)

Provision of adequate clothing.

Administration of Children's Homes Regulations 1951 (S.I. 1951
No. 1217) : Eng.

Administration of Children's Homes (Scotland) Regulations 1959
(S.I. 1959 No. 834) : Scot.

1951 r.5
1959 r.6

Provision of medical services, including
supervision of health and hygiene, medical
examination and attention.

1951 r.6
1959 r.7

Arrangements for dental care.

1951 r.11
1959 r.11

Restrictions on methods of corporal
punishment.

Rule or
RegulationProvision

Detention Centre Rules 1952 (S.I. 1952 No.1432) : Eng.

Detention Centre (Scotland) Rules 1960 (S.I. 1960 No.870):Scot.

1952 r.5 Detailed requirements of sleeping
1960 r.5 accommodation : light, warmth, ventilation.

1952 r.7 Separate bed and adequate bedding.
1960 r.7

1952 r.12 Medical examination of each inmate on
1960 r.12 reception.

1952 r.25 Prohibition of use of unnecessary force.

1952 r.41 Restrictions upon use of intoxicating
1960 r.37 (excisable in Scotland) drink and tobacco.

1952 r.46 Participation in physical training and
1960 r.42 organised games.

1952 r.67 Provision of sick bay for medical care
and treatment : removal to hospital.

1952 r.76 Arrangements for cleanliness, sanitation,
1960 r.76 heating, lighting and ventilation.

1952 r.77 Arrangements for washing, shaving and
1960 r.77 hair cutting.

Rule or
RegulationProvision

1952 r.78
1960 r.78

Provision of toilet articles.

1952 r.79
1960 r.79

Prescription of quality of food.

1952 r.83
1960 r.83

Provision and wearing of clothing.

Boarding-out of Children Regulations 1955 (S.I. 1955 No.1377):Eng

Boarding-out of Children (Scotland) Regulations 1959 (S.I. 1959
No.835): Scot.

1955 r.2
1959 r.3(1)

Restrictions on persons with whom
children may be boarded out.

1955 r.6
1959 r.2(2)

Medical examination required before
boarding out.

1955 r.7
1959 r.12(1)
and (2)

Medical examination required during boarding
out.

1955 r.8
1959 r.12(1)
and (2)

Arrangements for medical and dental
attention.

Children (Performances) Regulations 1968 (S.I. 1968 No.1728):

G.B.

1968 r.6

Restriction upon number of performing
days for children of certain ages.

1968 r.8

Medical examination required to establish
fitness to take part in performances.

<u>Rule or Regulation</u>	<u>Provision</u>
1968 r.13	Suitability of lodgings for child living away from where he normally lives.
1968 r.16	Restrictions upon number of days for performances without a prescribed break.
1968 r.21	Restrictions upon number of days in a week on which a child may take part in performances and rehearsals.
1968 r.22	Restriction on maximum number and length of performances and rehearsals daily.
1968 r.23	Prescription of earliest and latest hours for child to be present at place of performance and place of rehearsal.

(b) Independent Provisions

3.10 The first type of provision in Part 1 of this Table which treats welfare directly is completely self-contained and independent. Examples of it rely entirely upon the criminal sanction. Section 1(1) of the Children and Young Persons Act 1933⁷ makes it an offence "if any person who has

⁷ 23 Geo. 5, c.12.

attained the age of sixteen years and has the custody, charge or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement)." This important provision is a fairly comprehensive code protecting the physical and mental integrity of any child or young person. Naturally some of the words attract their own interpretational problems; for example, what amounts to "neglect" or "exposes" or when does "suffering" become "unnecessary"? These difficulties are not exceptional. The issues are clear; the criteria are objective; the provisions directly protect the welfare of children.

3.11 Section 1(1) of the 1933 Act is supported by a criminal sanction. Hence the statutory protection of children operates retrospectively as it applies to events which have allegedly happened and prospectively as a deterrent. It may for this reason be to some extent ineffective as a socially preventive measure and susceptible to the criticisms of the criminal sanction as an inadequate positive social regulator.⁸ In this sense it protects rather than promotes welfare.⁹

⁸ See Walker pp. 163, 203 to 207.

⁹ E.g. that an administrative system backed by appropriate resources is more likely to change social habits than criminal convictions.

3.12 This analysis also applies to the other provisions set out in Part 1 of this Table which constitute criminal offences; for example, the various sexual offences and offences against the person, the provisions relating to the supply of liquor, sale of tobacco, risk of burning, employment, participation in dangerous public performances, and certain education and licensing and other offences. Indeed the whole of the criminal law, whether it originates in statute or in the common law, in so far as it relates to offences against children, attracts similar comments. The essential feature is that the criminal law directly protects the welfare of children by identifying objectively conduct detrimental to children which is sufficiently reprehensible to warrant the imposition of a penalty.

(c) Dependent provisions

3.13 These considerations apply only partially to the second type of provisions in Part 1 of this Table. They treat welfare directly and objectively but they operate in conjunction with other provisions of which they are an integral part and from which they cannot be separated. These dependent provisions set out fundamentally how welfare is directly and objectively treated. A functional aspect is however introduced. For example, section 1(1)(a) of the Children Act 1948 places a duty upon the local authority to receive a child into their care where it appears to them

10 E.g. these offences.

11 Chapter 13.

"with respect to a child in their area appearing to them to be under the age of seventeen that he has been and remains abandoned by his parents or guardian." One ground or requirement in both section 1(1) of the 1933 Act and section 1(1)(a) of the 1948 Act is abandonment. The 1948 Act does not contain the further requirement of "unnecessary suffering or injury"; nor does the abandonment under the 1948 Act have to be wilful. To that extent it is wider. There is no prima facie reason to suppose that the common concept of abandonment is any different in either of these two contexts. A parent may be convicted under the 1933 Act and may also be deprived of the care of his child under the 1948 Act. But abandonment under the 1948 Act does not per se attract a penalty. The remedy in each case is radically different. Under the 1933 Act the defaulting parent or guardian is guilty of a criminal offence; under the 1948 Act he is liable to lose his parental right to the care of the child.

3.14 The factor in section 1(1)(a) of the 1948 Act which distinguishes it from section 1(1) of the 1933 Act is that the power of activating the remedy under the 1948 Act is a local authority function. The common element in the two provisions is their clear issues and objective criteria. The welfare of the children is thus directly protected. These comments also apply to the other instances in Part 1 of this Table of the objective and directly enforceable protection of the welfare of children, whether

the administrative functionary is a local authority,¹² a court¹³ or a children's hearing.¹⁴

(d) Subordinate legislation

3.15 A different but equally important detailed prescription of welfare may be found in subordinate legislation, examples of which are set out in Part 2 of this Table. All these provisions, except those referred to in the next paragraph, form part of the administrative code for the management of various types of residential centres. The regime in such houses and institutions is designed to promote the welfare of their inmates to the extent that such an object is not inconsistent with any other purpose of the treatment.¹⁵ Each set of rules is limited by the terms of its empowering provision, but the scope of the various rules is broadly similar. They cover matters of direct concern for the health and well-being of the child or young person; for example, personal and bed clothing, food and diet, medical and dental services, punishment, cleanliness and recreation.

3.16 The second type of regulation in Part 2 of this Table relates to the protection of children in the context of employment for public performances rather than to the

12 Children Act 1948, s.1(1)(a) and (b).

13 Adoption Act 1958, s.43(1); Custody of Children Act 1891, ss.1 and 3; Children and Young Persons Act 1969, s.1(2)(a) and (c); Children Act 1975 s.12(2)(c) to (f).

14 Social Work (Scotland) Act 1968, ss.15(1)(a) and (b) and 32(2)(b) and (c).

15 See e.g. Bevan pp. 156 to 166.

promotion of the child's well-being. Their enforcement is also administrative in character. As in the case of the other provisions in Part 2 no remedy is prescribed for breach of the rules or regulations or for any questionable exercise of any of the powers conferred by them. Control is presumably exercised administratively by means of central governmental supervision or through the common law at the instance of the affected inmate.¹⁶ The common law remedy¹⁷ never seems to have been used, no doubt because of the extreme difficulty in proving what had happened and is of no practical significance.

3.17 Certain of the provisions in Part 2 of Table 1 go further than prescribing objectively the aspect of welfare which is directly protected. They state in a slightly more generalised form how the aim is to be achieved in addition to stating the aim itself. In a limited sense the approach is functional. For example, certain rules simply require the provision of medical or dental services. The welfare of the child is directly protected by the provision of such services, and the provision of such services is in itself a reasonably objective standard. Admittedly it is less specific than, for example, the requirement of a separate bed for each inmate. To that extent the provision may also be classified in a different part of the graduated scale

16 E.g. the appointment of visitors or inspectors.

17 E.g. perhaps where the institution had failed to provide the prescribed food or accommodation; less likely where the treatment proved unsuccessful; more likely where unauthorised punishment was inflicted.

already discussed.¹⁸ The same provision may thus be considered in two different ways. It is not a defect of this classification that some provisions may and in fact do appear in different Tables. It is, it is suggested, a realistic record of the legislation. In any event objectivity is a matter of degree. Thus it is a finely balanced question which Table should contain certain provisions. These marginal difficulties illustrate the strength of this fundamental classification.

(e) An inchoate threshold approach

3.18 The same is true of the provisions in Part 1 of Table 1 which do not attract a criminal sanction. There are normally two aspects of these provisions. The statute confers a function. Then it prescribes objectively in what circumstances the function may be fulfilled. For example, section 12(2) of the Children Act 1975 enables the court to dispense with the agreement of a parent if inter alia the parent has abandoned, neglected or ill-treated the child. These criteria are as objective as the behaviour proscribed by section 1(1) of the Children and Young Persons Act 1933. That section, because it creates an offence, contains no discretionary element.¹⁹

18 Para. 3.7.

19 Except at most an interpretational discretion.

Section 12(2) of the 1975 Act clearly provides for the exercise of a judicial discretion once the objective criteria have been satisfied.

3.19 A similar example may be found in section 1(1)(a) of the Children Act 1948. This requires a local authority to receive a child into their care inter alia where the child has been abandoned by the parents or guardian.²⁰ Again there are two elements: the detailed statement of the circumstances in which the function may be fulfilled and the creation of the duty placed upon the local authority. Section 1(1)(a) of the 1948 Act may be distinguished from section 12(2) of the 1975 Act only in the sense that the former function is mandatory and the latter discretionary. Significantly each provision is classified in two different ways.²¹ This is an indication that many of the most important statutory provisions contain two distinct elements: the satisfaction of threshold requirements prior to the fulfilment of a function.

3.20 The preceding paragraphs have discussed the ways in which statutory provisions directly treat welfare when welfare is defined objectively. The capacity of one statutory provision to be analysed in two distinct ways indicates how welfare objectively defined may simultaneously be treated functionally. That means simply that welfare is

20 The additional requirement in s.1(1)(c) is ignored for the moment.

21 Both provisions are contained in Table 1. S.1(1)(a) of the 1948 Act also appears in Table 2 and s.12(2) of the 1975 Act in Table 4 in Chapter 5.

not immediately protected by the legislation. The intervention of some person or body is necessary to protect welfare. In other words the functional law does not operate automatically; an administrative or similar process is involved. This recognises the individuality of circumstances affecting the welfare of the particular child as distinct from the generality of a rule of law applied objectively. This leads to a consideration of the ways in which objective welfare is treated functionally.

Section 3 - Objective welfare treated functionally

(a) Table 2

3.21 Some legislation affecting children does not prescribe objectively the appropriate standard of conduct although the welfare of the child is directly affected by the standard otherwise implied by Parliament. A great deal of such legislation is partly administrative in character in that it confers various powers or imposes certain duties upon such bodies as local authorities, courts (including juvenile courts)²² and children's hearings. The relationship between the function conferred and the welfare of the child is always close although it has not always been articulated in detail by the Parliamentary draftsman. It takes many forms. For present purposes this is described as the functional approach and it means basically the conferment of functions upon the more appropriate body to achieve a specified objective. This analysis is concerned more with the objective rather than with the means of achieving that objective.

22 I.e. when courts are not adjudicating upon rights.

TABLE 2OBJECTIVE WELFARE TREATED FUNCTIONALLYPart 1 - Provisions of Acts of Parliament

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
<u>Children and Young Persons Act 1933 (23 & 24 Geo.5, c.12): Eng.</u>		
<u>Children and Young Persons (Scotland) Act 1937 (1 Edw.8 & 1 Geo.6, c.37): Scot.</u>		
1933 s.25(2)	Duty placed upon police magistrate not to grant a licence to allow persons under 18 to go abroad for performing.	Unless the child is fit for the purpose and proper provision has been made to secure his health, kind treatment, adequate supervision and return.
1933 s.44(1)	Duty placed upon court to	Removal from undesirable
1937 s.49(1)	take certain steps in dealing with a child or young person	surroundings; secure provision for education and training (except in Scotland).
<u>Education Act 1944 (7 & 9 Geo.6, c.31):Eng.</u>		
<u>Education (Scotland) Act 1962 (10 & 11 Eliz.2, c.47):Scot.</u>		
1944 s.8(1)	Duty placed upon local	Primary and secondary
1962 s.1(1)	education authority to secure the availability of sufficient schools.	education.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
1944 s.33(2)	Arrangements to be made by	Special educational
1962 s. 5(2)	local education authority	treatment.
	for pupils with some	
	disability.	
1944 s.34(1)	Duty placed upon local	Special educational
1962 s.63(1)	education authority to	treatment.
	ascertain children	
	suffering from some	
	disability.	
1944 s.36	Duty placed upon parents	Education suitable to
1962 s.31	to cause their child to	age, ability and
	attend school or other-	aptitude of child.
	wise receive education.	
1944 s.54(1)	Medical examination of	Cleanliness.
1962 s.61(1)	persons and clothing by	
	administrative direction	
	of local education	
	authority.	

National Health Service Act 1946 (9 & 10 Geo.6, c.81): Eng.

National Health Service (Scotland Act) 1947 (10 & 11 Geo. 6, c.27):
Scot.

1946 s.22(1)	Duty placed upon local	To make arrangements
1947 s.22(1)	health authority with	for their care, in
	regard to children under	particular their dental
	5 years of age and not	care.
	attending local education	
	authority primary schools.	

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
<u>Children Act 1948 (11 & 12 Geo.6, c.43): Eng.</u>		
<u>Social Work (Scotland) Act 1968 (1968 c.49): Scot.</u>		
1948 s.1(1)(a)	Duty placed upon local	Absence of or
1968 s.15(1)(a)	authority to receive child into their care.	abandonment of child by parent or guardian.
1948 s.1(1)(b)	Duty placed upon local	Incapacity of parent
1968 s.15(1)(b)	authority to receive child into their care.	or guardian.
1948 s.13(1) and (2)	Means by which local authority shall discharge their duty towards children in their care (boarding out, maintenance in community or voluntary home, etc.).	Provision of accommo- dation and maintenance.
1968 s.21(1)		
<u>Criminal Justice Act 1948 (11 & 12 Geo.6, c.58): Eng.</u>		
<u>Criminal Justice (Scotland) Act 1949 (12, 13 & 14 Geo.6, c.94):</u>		
<u>Scot.</u>		
1948 s.17(2)	Duty placed upon court	Character and physical
1949 s.18(2)	to obtain and consider information and to take it into account before considering alternative to imprisonment on person under 21.	and mental condition.

SectionFunctionWelfareNurseries and Child-Minders Regulation Act 1948 (11 & 12Geo.6, c.53) : G.B.

1948 s.1(3)	Power of local health authority to refuse to register premises.	If the persons employed on the premises are not fit.
-------------	-----------------------------------------------------------------	------------------------------------------------------

1948 s.1(4)	Power of local health authority to refuse to register person.	If any person or any persons employed on the premises are not fit.
-------------	---------------------------------------------------------------	--------------------------------------------------------------------

Children Act 1958 (6 & 7 Eliz.2, c.65) : G.B.

1958 s.1: Eng.	Duty placed upon local authority as regards	Secure visiting and giving advice.
-------------------	---------------------------------------------	------------------------------------

1958 s.1A: Scot.	foster children within their area.	
---------------------	------------------------------------	--

1958 s.4(2)	Requirements which may be imposed upon foster parents by the local authority.	Number, age, and sex of foster children, provision of accommodation and equipment, arrangements for protecting the health of the children.
-------------	-------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------

Adoption Act 1958 (7 & 8 Eliz.2, c.5): Scot.Adoption Act 1976 (1976 c.36): Eng.

1958 s.38	Duty placed upon local authority to secure that protected children within their area are visited from time to time.	Advice as to care and maintenance.
-----------	---------------------------------------------------------------------------------------------------------------------	------------------------------------

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
----------------	-----------------	----------------

Children and Young Persons Act 1963 (1963 c.37) : G.B.

1963 s.3(2)	Investigation by local authority for report to court (children and young persons beyond control).	Home surroundings, school record, health and character of child or young person.
1963 s.37(4)	Duty placed upon local authority not to grant a licence for persons under 16 to take part in a public performance.	Unless the child is fit to do so, proper provision has been made to secure his health and kind treatment.
1963 s.58	Power of local authority in certain circumstances to assist persons formerly under their care.	Visit, advise, befriend or give financial assistance to assist persons formerly under their care.

Children and Young Persons Act 1969 (1969 c.54): Eng.

1969 s.9(1)	Investigation by local authority for report to court (care or offence proceedings).	Home surroundings, school record, health and character of child or young person.
1969 s.12(2)	Requirements which may be imposed upon a person by the supervisor.	Place of residence; presenting of person; participating in activities.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
1969 s.12(4)	Requirements which may be imposed upon a supervised person by the court.	Special medical treatment as resident or non-resident patient.
1969 s.14	Duty placed upon the supervisor.	Advise, assist and befriend the person supervised.
1969 s.24(5)	Duty placed upon the visitor appointed to a person subject to a care order.	Visit, advise and befriend the person subject to the care order.
1969 s.36(4)	Proposals to be contained in every regional plan in relation to community homes.	Facilities for the observation of the physical and mental condition of children in care and for the assessment of the most suitable accommodation and treatment for those children.
1969 s.38	Duty placed upon local authority in relation to community homes.	Provide, manage, equip and maintain the home.

Part 2 - Provisions of Statutory Instruments

<u>Rule or Regulation</u>	<u>Function</u>	<u>Welfare</u>
<u>Approved School Rules 1933 (S.R. & O. 1933 No.774): Eng.</u>		
1933 r.10(2)	Duty placed upon approved school managers to ensure satisfactory condition of school and to pay visits to school.	Training, welfare and education of the boys.
1933 r.44(1)	Duties placed upon medical officer appointed by approved school managers.	Health, diet and hygiene.
1933 r.45(1)	Duties placed upon dentist appointed by approved school managers.	Examination of teeth and dental work.
<u>Approved Probation Hostel and Home Rules 1949 (S.I. 1949 No.1376): Eng.</u>		
1949 r.6(1)	Duty placed upon the committee of management of the hostel or home.	Condition of the hostel or home; training and welfare of the residents.
1949 r.29(1)	Duties placed upon medical officer appointed by committee.	Health, diet and hygiene.
1949 r.30	Duty placed upon committee to ensure arrangements for health.	Medical and dental treatment.

<u>Rule or Regulation</u>	<u>Function</u>	<u>Welfare</u>
<u>Borstal (Scotland) Rules 1950 (S.I. 1950 No.1944):Scot.</u>		
<u>Borstal Rules 1964 (S.I. 1964 No.387): Eng.</u>		
1950 r.4(1)	Objects of borstal	To lead to a good and useful
1964 r.1(2)	training.	life; to abstain from crime; to develop his character, ability and sense of personal responsibility.
1950 r.66(1)	Duty placed upon	General care of the health
1964 r.19(1)	medical officer.	of the inmate.
1950 r.76	Duties placed upon medical officer and Governor.	Dental treatment.
1964 r.45(1)	Power of Governor to order inmate to be put under restraint.	Prevention of injury to self.
1964 r.75(1)	Duty placed upon Board of Visitors.	Premises, administration and treatment of the inmates.
1950 r.82(1)	Inmates to be given	As required to promote
1964 r.28(1)	regular physical recreation, training and exercise.	health and physical well-being.

<u>Rule or Regulation</u>	<u>Function</u>	<u>Welfare</u>
<u>Administration of Children's Homes Regulations 1951 (S.I. 1951 No.1217): Eng.</u>		
<u>Administration of Children's Homes (Scotland) Regulations 1959 (S.I. 1959 No.834): Scot.</u>		
1951 r.5(2)	Duties placed upon medical	Health and hygiene
1959 r.6(2)	officer appointed by administering authority.	
1951 r.6	Duty placed upon administering Dental care.	
1959 r.7	authority.	
1951 r.9	Duty placed upon	Saving life in case
1959 r.9(2)	administering authority to secure fire drill.	of fire.
<u>Detention Centre Rules 1952 (S.I. 1952 No.1432): Eng.</u>		
<u>Detention Centre (Scotland) Rules 1960 (S.I. 1960 No.870): Scot.</u>		
1952 r.5	Certification (approval in	Size, light, warmth,
1960 r.5	Scotland) of sleeping accommodation for inmates.	ventilation and health.
1952 r.58(1)	Duty placed upon Board of	After-care of inmates.
1960 r.58(1)	Visitors (Visiting Committee in Scotland).	
1952 r.67(1)	Duty to equip and furnish sick bay.	Medical care and treatment for minor illnesses.

<u>Rule or Regulation</u>	<u>Function</u>	<u>Welfare</u>
1952 r.68 1960 r.63(1)	Duty placed upon medical officer.	Mental and physical health.
1952 r.76 1950 r.76	Duty placed upon medical officer to supervise the hygiene of the centre and the inmates.	Cleanliness, sanitation, heating, lighting and ventilation.

Prison (Scotland) Rules (S.I. 1952 No.565): Scot.

1952 r.151	Special attention for young prisoners.	Moral, mental and physical training; assistance and care on discharge.
------------	----------------------------------------	------------------------------------------------------------------------

Boarding-out of Children Regulations 1955 (S.I. 1955 No.1377): Eng.

Boarding-out of Children (Scotland) Regulations 1959 (S.I. 1959 No.835): Scot.

1955 r.6	Medical examination before boarding-out.	Physical health and mental condition.
1955 r.8 1959 r.12	Arrangements to be made for medical and dental attention for child boarded out.	Health.
1955 r.17(1) (a)	Restriction on boarding-out of foster children without report from visitor on prescribed matters.	Satisfactory sleeping and living accommodation; suitable household.

<u>Rule or Regulation</u>	<u>Function</u>	<u>Welfare</u>
1955 r.22(1)	Duty placed upon local authority or voluntary organisation to keep child boarded-out under review.	Welfare, health, conduct and progress of child.
1959 r.2(2) (a)	Duty to obtain medical report in writing before boarding-out.	Child's bodily health and mental condition.
1959 r.5	Duty to be satisfied as regards foster parent before boarding out.	Good character and suitability of foster parent.

Attendance Centre Rules 1958 (S.I. 1958 No.1990): Eng.

1958 r.2(1)	Purpose of the occupation and instruction given at attendance.	Health of mind and body.
-------------	----------------------------------------------------------------	--------------------------

Probation Rules 1965 (S.I. 1965 No.723): Eng.

1965 r.36(1)	Duty placed upon probation officer to take advantage of certain facilities.	Social, recreational or educational facilities suited to age, ability and temperament.
1965 r.36(2)	Duty placed upon probation officer to ensure certain matters.	Suitable and regular employment.

Rule or
RegulationFunctionWelfareChildren's (Performances) Regulations 1968 (S.I. 1968No.1728): G.B.

1968 r.2(1)	Power of licensing authority to request that child be medically examined.	To see if he is fit and his health will not suffer.
1968 r.12(5)	Reason for confiding care and control of child to matron.	Health, comfort, kind treatment and moral welfare.
1968 r.14	Duty placed upon local authority not to approve place of performance or rehearsal.	Unless arrangements have been made for meals, dress, rest, recreation sanitary conveniences, and washing facilities.
1968 r.15	Duty placed upon licensee after last performance or rehearsal.	Getting child home.
1968 r.17(1) (a)	Duty placed upon licensee to ensure medical examination of child at certain times.	Fitness and health.

(b) The nature of the functional approach

3.22 Table 2 contains several examples of the functional approach. Each provision has two aspects: the conferment of a function, either a power or a duty, and a statement of the aim or purpose of the function. Normally they are distinct. Sometimes the method of fulfilling the function is also specified.²³ Occasionally the two aspects are merged. In the examples in Table 2 the aim of the function is directly related to the welfare of the child, although welfare is not described as such or in similar general terms but more specifically.²⁴ These examples may be compared to those in Table 1. The latter describe the legal consequences of conduct affecting children detrimentally. The former set out to bring about some change in the situation of the relevant children, unquestionably to their advantage, usually by contemplating future action, but sometimes with reference also to what has happened in the past. The instances in Table 1 thus protect welfare by preventing avoidable consequences and Table 2 contains a pattern for protecting children by changing some aspect of their lives. In this sense the Table 2 pattern tends to promote actively the welfare of children.

23 E.g. s.13(1) and (2) of the Children Act 1948; r.10(2) of the Approved School Rules 1933.

24 E.g. health, character, education, accommodation, maintenance, fitness, after-care, training, comfort. Occasionally they are more specific: dental care, medical care, cleanliness, sanitation. Often they are a combination of such factors.

3.23 Consider, for example, section 3(2) of the Children and Young Persons Act 1963. This places a duty upon the local authority in certain circumstances to make such investigations as may be necessary and the objective of the function is to provide information for the court as to the home surroundings, school record, health and character of the child or young person in question. This objective itself contemplates certain specific instances of welfare. There would however appear to be further unarticulated objectives. Section 3(2) of the 1963 Act applies where a complaint has been made for an order against a local authority by a parent or guardian directing the local authority to bring the child or young person before a juvenile court under section 1 of the Children and Young Persons Act 1969. The immediate purpose is to establish whether care proceedings are justified on the ground that the child or young person is inter alia in need of care or control while the ultimate purpose is to decide, if necessary, what course should be taken in the best interests of the child or young person.

3.24 Each aspect of the statutory function is part of a series of graduated links in a complicated statutory chain. All the links in the chain are normally found in some relevant statutory provision. The ultimate link however need not necessarily be found in the same provision. It may be found in a different section or even in a different Act of Parliament.²⁵

25 E.g. Children and Young Persons Act 1933, s.44; Children Act 1948, s.12; Guardianship of Minors Act 1971, s.1.

Welfare plays some part in each of these provisions and the part played is by no means uniform. In a sense therefore these ultimate links related to welfare act as a form of grundnorm in their particular circumstances.

3.25 To look at some other examples: section 36 of the Education Act 1944 places a duty upon parents to cause their child to attend school regularly or otherwise receive efficient full-time education. The objective is to ensure that the child receives full-time education suitable to his age, ability and aptitude. A provision which is susceptible to similar analysis, although it operated rather differently before its repeal, is section 7(2) of the Adoption Act 1958. This sets out certain of the factors to which the court should have regard in determining whether an adoption order would be for the welfare of the child, namely the health of the applicant and the wishes of an infant of sufficient age and understanding. The health of the applicant clearly has a bearing upon the welfare of the child and it would be difficult to deny the relevance of the wishes of such a child. This has been superseded partly by section 3 of the Children Act 1975 which pro tanto may be similarly analysed. These factors are thus part of the statutory process whose objective is the promotion of the welfare of the child, a point clearly emphasised by the heading given to section 3 of the 1975 Act.

3.26 Some provisions in Part 1 of Table 2 fit into this pattern less easily. In these instances the operation of the function is restricted by the fulfilment of certain

conditions. These conditions, although restrictive, nevertheless operate obliquely as an objective of the exercise. To some extent they may overlap marginally with some provisions in Table 4 in chapter 5.²⁶ Again it may be a question of degree.²⁷ But even so the examples in Table 2 may reasonably be distinguished from those in Table 4. The feature of the distinction is the direction in which the condition operates. For instance, section 37(4) of the Children and Young Persons Act 1963 restricts a local authority from granting a licence for persons under sixteen to take part in a public performance unless they are satisfied inter alia that the child is fit to do so and that proper provision has been made to secure his health and kind treatment. Section 1(3) of the Nurseries and Child-Minders Regulation Act 1948 authorises a local health authority to refuse to register premises under the Act if they are satisfied inter alia that any person employed or proposed to be employed in looking after children at the premises is not a fit person to look after children. These provisions are protective of welfare in the sense that they apply to existing circumstances. Both however contain indications relevant to the promotion of the child's future welfare: namely, the future security of the child's health and kind treatment in section 37(4) of the 1963 Act and, perhaps less strongly, the fitness to care for children in section 1(3) of the 1948 Act.

26 Which deals with the fulfilment of welfare considerations as a sine qua non of the exercise of a discretion.

27 As in the marginal differences between Tables 1 and 2.

3.27 This analysis suggests that these provisions²⁸ may be classified as examples of the objective treatment of welfare operating in a functional context. They are perhaps less amenable to this classification than the other provisions set out in Table 2. It is nevertheless suggested that their inclusion in this Table is not a distortion of their role. Rather it indicates marginally how Table 2 differs from the other classifications adopted. Such marginal confusion once again does not destroy but helps to emphasise the essential character of the various provisions categorised in the Table.

(c) Subordinate legislation

3.28 The structure of the subordinate legislation instanced in Part 2 of Table 2 follows broadly the pattern of the Acts themselves. It is thus not surprising that all the provisions in Table 2 are administrative in character. Otherwise their context would not be functional. The main point of distinction between Parts 1 and 2 of the Table is that sometimes in Part 2 it is less easy to separate the function from the objective. The draftsman has sometimes merged the two aspects as part of a single process. In such cases this classification has introduced a rather artificial duality where in practice none exists. But it does not destroy the foundation of the classification which is fundamentally static. On the other hand there are instances in Part 2 where the dual aspects of

28 I.e. those discussed in the preceding paragraph.

the classification could not be clearer. The Borstal Rules confer various functions individually but the introductory rules also specify what are the prescribed objects of borstal²⁹ training. The Attendance Centre Rules do likewise for attendance centres and rule 151 of the Prison (Scotland) Rules 1952 sets out a general objective for the treatment of young prisoners in Scotland. The last three examples in effect operate as statements of official policy couched in precise Parliamentary form. No doubt they would be invaluable to those administering the rules but it is perhaps questionable whether and to what extent they comply with current rules governing subordinate legislation.³⁰ The question is probably academic since they are unlikely ever to be enforced through the legal process.

(d) Enforcement

3.29 It is a further feature of the provisions contained in Table 2 that means for their enforcement are not normally prescribed.³¹ The same applies to the more functional provisions in Table 1. This is arguably an advantage, not a defect. The criminal law and legal remedies would be largely out of place in such a context, at least according to current doctrine.³²

29 E.g. Borstal (Scotland) Rules 1950, r.4(1).

30 E.g. are they intra vires; do they constitute "rules"; are they enforceable; are they precise enough?

31 Except in the case of breaches of the provisions of the Education Acts.

32 Because the law is dealing with the welfare of children, flexibility is necessary, technicalities are to be avoided and administrative procedures are more likely to be effective: i.e. the concept of "individualised justice". See e.g. Polier J.W., The rule of law and the role of psychiatry (Baltimore, 1968), chapter IV.

Control is no doubt largely administrative or political in practice.³³ This would be entirely consistent with the nature of the provisions. Most of those in Part 1 apply to local authorities or their constituent bodies;³⁴ a few to courts;³⁵ only one to individual persons at large.³⁶ Generally Part 2 sets out standards implemented functionally by or through officials or official bodies, such as probation officers, medical officers, dental officers, Governors, school managers, Boards of Visitors, committees of management, administering authorities or local authorities. Most of these functional standards relate to institutional establishments of one kind or another.³⁷

-
- 33 E.g. as a series of links in a chain of responsibility within the local authority structure and then subject to further links attaching the local authority to central government responsibility.
- 34 Including certain officials, e.g. probation officers.
- 35 E.g. Children and Young Persons Act 1933, s.25(2); Criminal Justice Act 1948, s.17(2).
- 36 E.g. Education Act 1944, s.36.
- 37 E.g. prisons, borstals, detention centres, attendance centres, homes, etc. The exceptions are the Adoption Agencies Regulations and the Children's (Performances) Regulations. R.14 of the latter regulations is also an example of the specification of the objective of the function as a condition to be satisfied before the function can be performed.

CHAPTER 4THE GENERALISED TREATMENT OF WELFARESection 1 - Introduction

4.1 The preceding chapter considered the welfare of children regulated in specific terms by statute, both directly and functionally. It was a feature of that classification that the expression "welfare" had no part to play. That expression is used frequently in Acts of Parliament and delegated legislation. Its significance and role vary depending upon the terminology and grammatical structure of the provisions. It is the purpose of this chapter to classify and analyse statically the various ways in which the generalised concept of welfare operates in legislation affecting children.

4.2 The word itself is relatively indeterminate. It is susceptible of different shades of meaning; its application varies according to individual sets of circumstances. No doubt Parliament selected it by reason of its adaptability. Its very nature suggests that in whatever context it appears, either discretionary or mandatory, a certain degree of interpretational discretion cannot be avoided. For example, if statute places a duty upon an institution to do something for the well-being of the child, there is despite the obligatory nature of the directive, an inherent discretion involved in contemplating the welfare of the child. On the other hand, if the institution is empowered to do something

for the well-being of the child, there is a substantive as well as an interpretational discretion. It is not therefore surprising that most of the examples of the use of the expression are functional in character, in the sense that they are related somehow to the implementation of an obligation or the exercise of a discretion. This is confirmed, in theory at least, by the absurdity of Parliament enacting that it shall be an offence for any person to affect detrimentally the welfare of a child or for any person not to secure and promote the welfare of a child. Direct prescription of welfare obviously requires a much greater degree of precision.

4.3 Table 3 in this chapter and Table 4 in Chapter 5 attempt to set out the most significant examples of the statutory uses of the word "welfare" and its equivalents. It is a feature that all the examples are functional. In the case of Table 3 welfare is either contemporaneous with or follows upon the function; in the examples in Table 4 welfare precedes the function. The classification is rendered more complex because in the examples in Table 3, although they all operate functionally, the relationship between welfare and the function is not uniform. There are three aspects of this relationship. Firstly, welfare may be the objective or aim of the fulfilment of the function. In that sense welfare has a role to play which embraces the whole process. Secondly, the role of welfare may be less total. The statute or regulation may direct that the

welfare of the child is a factor or consideration to which the functionary, whether court or administrative body, must pay attention or have regard. Finally welfare may operate negatively as the justification for releasing a functionary from an otherwise binding statutory duty. This final aspect of the examples in Table 3 comes closest to the classification in Table 4. In that Table the welfare of the child is a requirement which must be fulfilled before a power can be exercised: in other words, a threshold requirement. In Table 3 it is the factor which prevents a duty from being implemented.

TABLE 3

GENERAL WELFARE OF A CHILD AS A FACTOR IN THE
FUNCTIONAL APPROACH

Part 1 - Provisions of Acts of Parliament

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
<u>Custody of Children Act 1891 (54 & 55 Vict., c.3): G.B.</u>		
1891 s.3	Duty placed upon court not to order delivery of child to parent unless parent is fit person to have custody.	To have regard to the welfare of the child.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
<u>Children and Young Persons Act 1933 (23 & 24 Geo.5, c.12):Eng.</u>		
<u>Children and Young Persons (Scotland) Act 1937 (1 Edw.8 & 1 Geo.6, c.37): Scot.</u>		
1933 s.44(1)	Duty placed upon the court	To have regard to the
1937 s.49(1)	in dealing with a child or young person as offender or otherwise.	welfare of the child.
1937 s.40(1)	Duty placed upon police officer to liberate an apprehended person on bail.	Unless it is necessary in his interests to remove him from association with any reputed criminal or prostitute.
<u>Education Act 1944 (7 & 8 Geo. 6, c.31):Eng.</u>		
<u>Education (Scotland) Act 1962 (10 & 11 Eliz.2, c.47):Scot.</u>		
1944 s.59(1)	Power of (duty placed	As they appear to be
1962 s.17(1)	upon in Scotland) local education authority to impose restrictions upon the employment of a child in certain circumstances.	expedient in the interests of the child.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
<u>Children Act 1948 (11 & 12 Geo.6, c.43): Eng.</u>		
<u>Social Work (Scotland) Act 1968 (1968 c.49): Scot.</u>		
1948 s.1(1) (c)	Duty placed upon local authority to receive child	Intervention is necessary in the
1968 s.15(1) (c)	into their care.	interest of the welfare of the child.
1948 s.1(2)	Duty placed upon local	So long as the welfare
1968 s.15(2)	authority to keep in their care the child already received into their care.	of the child appears to require it.
1948 s.1(3)	Duty placed upon a local	If it appears con-
1968 s.15(3)	authority to secure that the parental care of the child already received into care is restored.	sistent with the welfare of the child.
1948 s.2(5) (c)	Duty placed upon court court not to order	Unless it is in the interests of the child.
1968 s.16(8) (a)	assumption of parental rights, powers and duties.	
1948 s.12(1)	Duty placed upon a local	To give first
1968 s.20(1)	authority in reaching decisions relative to children in their care.	consideration to the need to safeguard and promote welfare.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
1948 s.17(2)	Duty placed upon Secretary	Unless it would
1968 s.23(2)	of State not to allow	benefit the child
	emigration of child.	and that suitable
		arrangements have been
		made for his welfare.
1948 s.34(1)	Duty placed upon local	Unless the welfare of
1968 s.26(1)	authority to advise and	the child does not
	befriend child formerly	require it.
	in their care.	
1948 s.54(3)	Duty placed upon local	In the interests of
	authorities to cause	the well-being of the
	children in voluntary	children.
	homes to be visited.	

Nurseries and Child-Minders Regulation Act 1948 (11 & 12 Geo.6, c.53): G.B.

1948 s.7(1)	Power of authorised person	Arrangements for the
	to enter and inspect	welfare of the children.
	premises and children.	

Criminal Justice Act 1948 (11 & 12 Geo.6, c.58): Eng.

Criminal Justice (Scotland) Act 1949 (12, 13 & 14 Geo.6, c.94): Scot.

1948 s.17(2)	Duty placed upon court not	Unless there is no
1949 s.18(2)	to impose imprisonment on	other appropriate
	a person under 21.	method of dealing with
		him.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
<u>Children Act 1958 (6 & 7 Eliz.2, c.65): G.B.</u>		
1958 s.1: Eng.	Duty placed upon local authority as regards foster children in their area.	To satisfy themselves as to the well-being of the children.
1958 s.1A: Scot.	Duty placed upon local authority as regards foster children in their area.	To secure the welfare of the children.
<u>Adoption Act 1958 (7 & 8 Eliz.2, c.5): Scot.</u>		
<u>Adoption Act 1976 (1976 c.36): Eng.</u>		
1958 s.38 1976 s.33	Duty placed upon local authority to secure that 'protected' children within their area are visited by their officers.	To satisfy themselves as to the well-being of the children.
<u>Children and Young Persons Act 1963 (1963 c.37): G.B.</u>		
1963 s.1(1)	Duty placed upon the local authority to make available advice, guidance and assistance.	To promote welfare by diminishing the need to receive or keep children in care.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
<u>Social Work (Scotland) Act 1968 (1968 c.49): Scot.</u>		
1968 s.12	Duty placed upon local authority in respect of specified persons including children under the age of 18.	To promote social welfare by making available advice, guidance and assistance.
1968 s.15(4)	Duty placed upon local authority not to take over the care of a child from another local authority.	Unless they are satisfied that the taking over will not be detrimental to his welfare.
1968 s.43(1)	Duty placed upon children's hearing after the referral of a case.	To consider on what course they should decide in the best interests of the child.
1968 s.47(1)	Restriction upon duration of a supervision requirement.	No longer than is necessary in the interest of the child.
1968 s.52	Power of Secretary of State to terminate a supervision requirement in force in respect of a child.	Having regard to the interests of the child.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
1968 s.68(1)	Duty placed upon local authority from time to time to cause persons in establishments in its area to be visited.	In the interests of the well-being of such persons.

Children and Young Person Act 1969 (1969 c.54): Eng.

1969 s.2(2)	Duty placed upon local authority to bring care proceedings except in certain circumstances.	Except when contrary to the interests of child or young person.
1969 s.28(5)	Duty placed upon justice to release child detained in place of safety except in certain circumstances.	Unless child ought to be further detained in his own interests.
1969 s.29(1) (i)	Duty placed upon police officer to release child arrested except in certain circumstances.	Unless child ought to be further detained in his own interests.

SectionFunctionWelfare

Matrimonial Proceedings (Children) Act 1958 (6 & 7 Eliz. 2, c.40): Scot.

Matrimonial Proceedings and Property Act 1970 (1970 c. 45): Eng.

1958 s.8(1) (a)	Duty placed upon court not to grant (in England make absolute) certain decrees unless certain arrangements have been made for the children.	Satisfactory arrangements for the welfare of every child over whom the court has jurisdiction.
1970 s.17(1) (b)(i)		

Guardianship of Minors Act 1971 (1971 c.3): Eng.

Guardianship of Infants Act 1886 (49 & 50 Vict., c.27): Scot.

Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c.45): Scot.

Illegitimate Children (Scotland) Act 1930 (20 & 21 Geo. 5, c.33): Scot.

1971 s.1 1925 s.1	Duty placed upon court in proceedings involving the custody or upbringing of a minor.	To regard the welfare of the minor as the first and paramount consideration.
1971 s.9(1) 1886 s.5	Power of court to make an order regarding custody and access.	To have regard to the welfare of the minor.
1971 s.10(1) (a) 1925 s.5(4)	Power of court to make an order regarding custody and access when a person has been appointed sole guardian by the court.	To have regard to the welfare of the minor.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
1971 s.11(a)	Power of court to make an order regarding custody and access where one of the joint guardians is the mother or the father.	To have regard to the welfare of the minor.
1930 s.2(1)	Power of court to make an order regarding custody and access in relation to an illegitimate child.	To have regard to the welfare of the child.
<u>Guardianship Act 1973 (1973 c.29): G.B.</u>		
1973 s.1(2): Eng.	Inter-parental agreement affecting an infant shall	If it will not be for the benefit of the
1973 s.10(2): Scot.	not be enforced.	infant.
<u>Children Act 1975 (1975 c.72): Scot.</u>		
<u>Adoption Act 1976 (1976 c.36): Eng.</u>		
1975 s.3	Duty in reaching	Need to safeguard and
1976 s.6	adoption decisions to have regard to all the circumstances.	promote welfare being the first consideration.

Part 2 - Provisions of Statutory Instruments

<u>Rule or Regulation</u>	<u>Function</u>	<u>Welfare</u>
<u>Approved School Rules 1933 (S.R. & O. 1933 No.774): Eng.</u>		
1933 r.10 (2)	Duty placed upon managers as regards the approved school and the residence.	To ensure the satis- factory training, welfare and education of the boys.
<u>Approved Probation Hostel and Home Rules 1949 (S.I. 1949 No.1376): Eng.</u>		
1949 r.6(1)	Duty placed upon managing committee as regards the hostel or home and the residents.	To ensure the satis- factory training and welfare of the residents.
<u>Borstal (Scotland) Rules 1950 (S.I. 1950 No.1944): Scot.</u>		
<u>Borstal Rules 1964 (S.I. 1946 No.387): Eng.</u>		
1950 r.57(1)	Special attention to be	As desirable in the
1964 r.32(1)	paid to the maintenance of the relations between an inmate and his family.	best interests of both.
1950 r.57(2)	Maintenance or establish-	As may promote the
1964 r.32(2)	ment of relations with persons or agencies out- side the institution.	best interests of his family and himself.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
1964 r.35(2)	Power of Governor to allow an inmate an additional letter or visit.	Where necessary for his welfare.

Administration of Children's Homes Regulations 1951 (S.I. 1951 No.1217): Eng.

Administration of Children's Homes (Scotland) Regulations 1959 (S.I. 1959 No.834): Scot.

1951 r.1	Duty placed upon	To secure the well-
1959 r.1	administering authority to make certain arrangements for every home.	being of the children in the home.
1951 r.2	Duty placed upon visitor	Whether it is conducted
1959 r.2	appointed by the administering authority to satisfy himself and to report on the conduct of the home.	in the interests of the well-being of the children.

Detention Centre Rules 1952 (S.I. 1952 No.1432): Eng.

Detention Centre (Scotland) Rules 1960 (S.I. 1960 No.870):Scot.

1952 r.57(1)	Duty to pay special	Such as desirable in
1960 r.52(1)	attention to the maintenance of relations between an inmate and his family.	the best interests of the inmate.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
1952 r.6(1)	Power to impose certain	As they consider
1960 r.56(1)	restrictions upon and supervision over letters and visits.	necessary for the welfare of individuals.

Prison (Scotland) Rules 1952 (S.I. 1952 No.565): Scot.

1952 r.152	Power to modify these rules relating to visits and communication in application to young prisoners.	As desirable in relation to their welfare.
------------	-----------------------------------------------------------------------------------------------------------------	-----------------------------------------------

Boarding-out of Children Regulations 1955 (S.I. No.1377):Eng.

Boarding-out of Children (Scotland) Regulations 1959 (S.I.
1959 No.835): Scot.

1955 r.4	Duty placed upon authority	If no longer in best
1959 r.16(1)	not to allow child to remain boarded out.	interests of child.
1955 r.9	Duty placed upon visitor to report after visiting a child boarded-out.	After considering the welfare, health, conduct and progress of the child.
1955 r.17(1) (d)	Duty not to board-out child unless the avail- able history of the child and the relevant reports indicate certain factors.	Boarding-out would be in the best interests of the child.

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
1955 r.21(b)	Duty placed upon local authority to ensure certain visits during boarding-out.	As often as the welfare of the child requires.
1955 r.22(1)	Duty placed upon local authority to ensure a regular review in relation to every child boarded out.	Welfare, health, conduct and progress of every child.
1955 r.25	Duty not to board-out child unless visitor has reported on certain matters.	That boarding-out would be suitable to the needs of the child.

Probation Rules 1965 (S.I. 1965 No.723): Eng.

1965 r.36(1)	Duty placed upon probation officer to encourage a person under his supervision in certain matters.	To make use of any agency which might contribute to his welfare.
--------------	----------------------------------------------------------------------------------------------------	------------------------------------------------------------------

Magistrates' Courts (Children and Young Persons) Rules

1970 (S.I. 1970 No.1792): Eng.

1970 r.10 (1)(b)	Duty placed upon court to take into consider-	To enable court to deal with the case
---------------------	-----------------------------------------------	---------------------------------------

<u>Section</u>	<u>Function</u>	<u>Welfare</u>
1970 r.17(2) (d) Cont'd.	ation information as to general conduct, home surroundings, school record and medical history of child or young person found guilty of an offence.	in his best interests.
1970 r.20(1) (a)	Duty placed upon court to take into consider- ation information as to general conduct, home surroundings, school record and medical history of child or young persons proved to be in need of care.	To enable court to deal with the case in his best interests.
<u>Children's Hearings (Scotland) Rules 1971 (S.I. 1971 No.492):</u>		
<u>Scot.</u>		
1971 r.17(2) (d)	Duty placed upon children's hearing to endeavour to obtain certain views.	On what arrangements with respect to the child would be in his best interests.
1971 r.17(3)	Duty placed upon	If it would not be
1971 r.19(4)	chairman to disclose certain information.	detrimental to the interests of the child.

Section 2 - Welfare as a statutory objective

4.4 The two clearest examples of general welfare, however it may be phrased, as the positive objective of the exercise of a statutory function may be found in section 1(1) of the Children and Young Persons Act 1963 and section 12(1) of the Children act 1948. The former provision places a duty upon every local authority to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care. To analyse this provision: the function conferred upon the local authority is to make available advice, guidance and assistance. The function is supplemented by the power conferred by the last limb of the sub-section to give assistance in kind or in cash. This power adds nothing to the function. It simply interprets epexegetically the forms of assistance available in the first limb of the sub-section. The objective of the function is stated to be the promotion of the welfare of children. A qualification is added that the obligation is effective only if the objective is to be achieved by diminishing the need to receive children into care. The significant feature is the clarity with which the objective is expressed.

4.5 This is true also of section 12(1) of the 1948 Act which imposes upon the local authority a duty to exercise their powers with respect to a child in their care so as to further his best interests. The function is largely

unspecified as it refers to the general powers of a local authority with respect to a child in their care but the objective clearly relates to the general concept of a child's best interests. The policy of Parliament in 1948 was clear: the local authority was obliged to further the best interests of the child in their care. This was modified in 1969. Section 27(2) of the Children and Young Persons Act 1969 introduced a potentially conflicting consideration, namely the protection of the public. Thus if it is necessary to do so to protect members of the public, a local authority is empowered to disregard what still must be regarded as its primary duty, namely to further the best interests of the child. The clarity of the objective of section 12(1) of the 1948 Act is not affected but the introduction of a secondary objective may make the administration of the Act more difficult.

4.6 The legislative code dealing with children and young persons in Scotland used to be similar to that in England. Since the Social Work (Scotland) Act 1968 there has been a considerable divergence. The Children and Young Persons Act 1963 applied to Scotland and England when it was enacted.¹ Section 1(1) of that Act no longer applies to Scotland.² It has been replaced by section 12 of the

1 S.65.

2 Repealed for Scotland: Social Work (Scotland) Act 1968, Sched.9, Part 1.

Social Work (Scotland) Act 1968 and the scope of that provision has been considerably extended to include persons other than children and young persons.³ It places a duty upon each local authority to promote social welfare by making available advice, guidance and assistance. The concept of social welfare in this context is at once both wider and narrower than welfare in section 1(1) of the 1963 Act. It is wider as it applies more generally than to children and young persons; it is narrower in that the addition of the word "social" is a limiting factor to which the expression "welfare" is not subject. There would seem little doubt that the social welfare of a child excludes factors which would be included in a reference to his welfare. Does it exclude physical and mental health, the material aspects of life or his education? "Social" is not a precise word. Is it restricted to a child's relationship with other people? The issues do not seem to have been considered. It is suggested nevertheless that the introduction of the word "social" may, perhaps unintentionally, restrict the scope of the provision.

4.7 Statute also treats differently as between England and Scotland the duty placed upon local authorities to ensure the well-being of foster children. The Scottish provision, section 1A of the Children Act 1958⁴ which antedates the English provision, requires every local

³ S.12(2).

⁴ S.1A was introduced by virtue of s.19 of and para. 1 of Sched. 1 to the Social Work (Scotland) Act 1968.

authority "to secure the welfare" of foster children in their area. Section 1 of that Act,⁵ which applies in England, requires every local authority "to satisfy themselves as to the well-being" of such children.

Discounting any difference between "welfare" and "well-being", the Scottish provision is more direct and purposeful. To "secure" something is a clearer and stronger function than to "satisfy yourself" about it. Both are undeniably objectives of a statutory function. Perhaps in practice there may be little difference between them but the draftsman, whether intentionally or not, has introduced a difference of emphasis and degree.

4.8 There are also several examples of this type of approach in subordinate legislation. Statistically there are probably more such examples than those derived from legislation directly enacted by Parliament. This is perhaps odd, given the greater freedom of form available, theoretically at least, to Parliament and on the other hand the more restrictive formal rules applying to subordinate legislation. The best instance is probably rule 1 of the Administration of Children's Homes Regulations 1951 which requires the administering authority to make arrangements for every home on such principles as are calculated to secure the well-being of the children in the home. The

5 As substituted by virtue of s.72(5) of and para. 1 of Sched. 7 to the Children and Young Persons Act 1969.

function is not specified but the objective is stated unequivocally and in very general terms. There are other examples of delegated legislation which demonstrate this approach.⁶ They follow a similar pattern. Other ways of reaching the same or similar objectives may be found in Table 3. The distinguishing characteristic is that the following provisions relate more obliquely to the objective of the function. Section 1(3)(a) of the Children Act 1948 for example, places a duty upon the local authority to endeavour to secure that the care of a child in their care shall be restored to his parent or guardian where it appears to them consistent with the welfare of the child to do so. The objective of securing the welfare of the child is thus expressed as a condition attached to the exercise of the function. Rule 36(1) of the Probation Rules 1965 requires a probation officer to encourage a person under his supervision to make use of any statutory or voluntary agency which might contribute to the welfare of a child under his supervision. Welfare is obviously the object of the exercise, although it is not couched in direct and positive terms. The drafting is different; the approach is the same.

6 E.g. Approved Probation Hostel and Homes Rules 1949, r.6 (1); Borstal (Scotland) Rules 1950, r.57(1) and (2); Detention Centre Rules 1952, r.57(1); Prison (Scotland) Rules 1952, r.152; Magistrates' Courts (Children and Young Persons) Rules 1970, rr.8. 10(1)(b) and 20(1)(a).

Section 3 - Welfare as a statutory factor

4.9 There are many examples in Acts of Parliament which direct some appropriate body "to have regard" to the welfare of the child in coming to their decision. It does not appear to be a technique used much, if at all, in subordinate legislation.⁷ Several direct statutory examples are set out in Table 3. Statistically⁸ they are the most important type of statutory provision in Table 3; analytically they are the easiest provisions to locate, identify and classify. The language tends to be uniform. The phrase normally used is "having regard to". This directive is addressed normally to a court, sometimes to an administrative authority.⁹ In either case the Act merely declares in effect that the welfare of the child is a relevant consideration without, subject to one vital exception,¹⁰ indicating the significance of that consideration.

4.10 The simplest instances of this technique may be found in sections 9(1), 10(1)(a) and 11(a) of the Guardianship of Minors Act 1971, section 3 of the Custody of Children Act 1891 and section 2(1) of the Illegitimate Children (Scotland) Act 1930. These provisions all instruct the court to have regard to the welfare of the child in reaching a decision about custody. In each case

7 At least none has been found for inclusion in Table 3.

8 In the sense that most decided cases tend to deal with one or other of these provisions, particularly the section embodying the concept of the paramountcy of welfare.

9 E.g. Social Work (Scotland) Act 1968, s.52.

10 The section embodying the concept of the paramountcy of welfare.

other considerations are declared relevant by statute. Similarly, but in a different context, section 34 of the Adoption Act 1958 requires the court to have regard to the welfare of the infant when deciding whether to authorise a parent who has consented or agreed to the adoption of the infant to remove him from the care and possession of the applicant. Finally section 44(1) of the Children and Young Persons Act 1933 requires every court in dealing with a child or young person brought before it, as an offender or otherwise, to have regard to his welfare.

4.11 There are two particularly significant features about these examples. They all relate to courts and in each case the court is faced with a decision affecting the future of the child. The court is thus not adjudicating upon a past dispute. Parliament has felt justified in giving to the courts in these circumstances a considerable degree of flexibility. The provisions considered in sections 2 and 4 of this chapter, dealing with welfare as a statutory objective and as a release from a statutory duty, should be contrasted. They relate on the whole to administrative bodies and the circumstances in which these bodies are free to act are much more closely circumscribed. In other words they lack the flexibility conceded to the courts.

4.12 The only instance in Table 3 of a directive issued solely to an administrative body is section 52 of the Social

Work (Scotland) Act 1968. This enables the Secretary of State to terminate a supervision requirement¹¹ in force in respect of a child where he is satisfied it should be terminated "having regard to all the circumstances of the case and the interests of the child." This is a broad discretion and Parliament clearly has directed a wide investigation to enable a decision to be reached. The odd aspect of the provision is the word "and" conjoining "all the circumstances" and "the interests of the child". The interests of the child, it is suggested, would normally be part of the circumstances of the case. But Parliament seems to contemplate that the interests of the child represent a factor over and above all the circumstances of the case. Perhaps the intention was to emphasise the interests of the child. This however would have been correctly achieved by the use of "including" in place of "and". Whether that is correct or not, Parliament has not subsumed¹² the child's interests as part of the overall circumstances. The two criteria must therefore be treated separately. Whatever view is taken, section 52 of the 1968 Act is in several respects exceptional.

4.13 The principal exception however is section 1 of the Guardianship of Minors Act 1971. This provision applies widely and the court is directed to "regard the welfare of

11 See s.44(1) of the 1968 Act.

12 For the doctrine of subsumption, see paras. 1.34, 35.90 and 40.20 to 40.22.

the infant as the first and paramount consideration."

Welfare is thus not only relevant but Parliament has stated the significance to be attached to it. Whatever the directive means,¹³ welfare is required to play a role different from any other. It is given a privileged position. Its significance has caused it to be the subject of frequent judicial analysis; its apparent simplicity has led to a number of difficulties. But except for the priority afforded to the consideration, welfare remains along with the other instances in Table 3 referred to in this section, simply a factor to which the appropriate body must have regard. In this sense welfare as a statutory factor plays a neutral role; neither positive in the case of welfare as an objective of the exercise nor negative as a release from a statutory duty.

4.14 The most recent example of this formula is unique.¹⁴ What has become the grundnorm of the adoption process applies to decision of courts as well as to decisions of adoption agencies. The statutory directive is not to take welfare into consideration; it is to have regard to all the circumstances and in that process to give "first consideration" not to welfare in a general way but to the "need to safeguard and promote the welfare of the child throughout his childhood." This is a complex provision. It contains a hitherto unused formula. The introduction of a priority

¹³ A recurring question in this analysis.

¹⁴ Children Act 1975, s.3; Adoption Act 1976 s.6.

makes it comparable with section 1 of the Guardianship of Minors Act 1971 but at the same time the content of the welfare duty is made more precise without in any way reducing its generality. Whether the courts will recognise and give effect to these semantic differences remains to be seen.

Section 4 - Welfare as justification for release from a duty

4.15 Welfare as the justification for the release of a statutory functionary from the obligation to fulfil a statutory duty operates negatively to protect the child. It does not present an opportunity,¹⁵ for example by selecting one or other more advantageous course, to advance or promote the child's welfare; it simply prevents the fulfilment of a function which would otherwise harm the child. It may be argued that such a prophylactic approach is positive in the sense that the prevention of harm is as direct as bringing about a better state of affairs for the child. This may be so but the present classification of the legislation is nevertheless meaningful.¹⁶ The examples of this in Table 3 place duties, normally positive but sometimes of a negative or prohibitory nature, upon various bodies. It is open to

15 Available when statute confers a power or several powers supplemented by a stated objective.

16 This part is concerned not with the practical consequences of the legislation but simply with the purely formal structure of the provisions. To that extent it is an exercise in language.

them to escape this statutory duty where its implementation would harm the child. This is normally achieved by the fulfilment of a negative condition. The significance of the negative element of the provision applies to the condition but not to the duty, the fulfilment of which thus depends upon the implementation of the condition.

4.16 This description of the provisions in Table 3 falling under this classification appears complicated. But it is not. The examples are quite straightforward and an examination of one or two should be sufficient. The three instances derived from the Children and Young Persons Act 1969 place positive duties upon certain persons except where a negative condition is fulfilled.¹⁷ Section 2(2), for example, places a duty upon the local authority in certain circumstances to bring care proceedings unless they are satisfied inter alia that "it is neither in his interests nor the public interest to do so." The public interest does not presently have any relevance. It is clear that the local authority are released from their statutory duty to bring care proceedings where that course would be in the interests of the child or young person. A statutory duty is transformed into a more discretionary function on the fulfilment of a negative condition which operates directly to protect the child. Section 28(5) and 29(1)(i) of the 1969 Act may be similarly analysed although their welfare content, as it were, is different.

17 Children and Young Persons Act 1969, ss.2(2), 28(5) and 29 (1)(i).

4.17 Another example of considerable practical significance is section 8(1)(a) of the Matrimonial Proceedings (Children) Act 1958. This places a duty upon the court not to grant certain consistorial decrees unless inter alia satisfactory arrangements have been made for the welfare of the child over whom the court has jurisdiction. This is a negative duty, or in other words a prohibition, which may be obviated where the child's welfare has in effect been secured. Expressed more directly, but changing the statutory phraseology, if the child's welfare is secure, the court may grant the decree otherwise open to it. Put that way, the grammatical structure of the provision resembles that of the examples in section 2 of chapter 5¹⁸ of the use of welfare as a jurisdictional requirement for the exercise of a power. But Parliament has seen fit to enact the provision in a different form. It has been classified differently here. This, it is suggested, is correct. The grammatical structure of a provision is vital. Even a slight change could produce a different statutory scheme. A negative duty followed by an enabling negative condition is fundamentally different from the conferment of a power exercisable after the fulfilment of certain requirements. The emphasis is different; the point of departure differs; the approach to the problem is not the same. In practice the most significant distinguishing feature is that a prohibition followed by an enabling

18 See para. 5.20.

condition is orientated more to the child's future; hence it approximates to a statement of a statutory objective. On the other hand, the exercise of a power following the fulfilment of certain requirements tends more to look backwards.¹⁹ If welfare in a general way is associated with the condition or requirements, its role and significance thus varies depending upon this facet of grammatical structure.

4.18 Four other examples demonstrate this argument forcibly. Two, being instances of subordinate legislation, are more administrative in character. Regulations 17(1) (d) and 25 of the Boarding-Out of Children Regulations 1955 prohibit boarding-out except where certain steps have been taken to secure the child's welfare. This involves the interposition of a further function. In these examples a history of the child and relevant reports must be made available to enable a decision to be made whether boarding-out would be in the best interests of the child. This emphasises how closely this aspect of the classification approximates to welfare as a statutory objective.

4.19 The same is broadly true of section 17(2) of the Children Act 1948 and section 3 of the Custody of Children Act 1891. The former provision prevents the Secretary of State from consenting to the emigration of a child under

19 There are broad generalisations. It should not be expected that they will be true in every case.

section 17²⁰ unless satisfied inter alia that emigration would benefit the child and that suitable arrangements have been or will be made for the child's reception and welfare in the country to which he is going. In that grammatical form the child's future welfare is obviously the objective of the provision.

4.20 Section 3 of the 1891 Act declares that in certain circumstances, which are indicative of direct and objective protection of the child,²¹ the court shall not make an order for delivery of the child to the parent unless the parent has satisfied the court that, having regard to the welfare of the child, he is a fit person to have custody of him. This example also indicates the relevance of welfare as a consideration to which the court shall have regard²² in determining the fitness of the parent for custody. Thus the imposition of proving parental fitness in a welfare context suggests that the aim of the provision is the future welfare of the child. This is thrown vividly into relief when it is recalled that the duty is placed upon the court "where a parent has abandoned or deserted his child", a requirement directly protecting the present interests of the child in precise terms. Section 3 of the 1891 Act is thus a complex provision in terms of this classification, for it exhibits three separate and distinct aspects of the use

20 Which enables local authorities and in Scotland voluntary organisations to arrange or assist in arranging the emigration of children in their care. For Scotland see s.23 of the Social Work (Scotland) Act 1968.

21 Hence their inclusion in Table 1.

22 Thus falling within section 3 of this chapter, namely welfare as a statutory factor.

23

of welfare in legislation. Its very complexity also demonstrates, it is suggested, the fundamental strength of this classification.

4.21 One final provision in Table 3 is something of a specialty in this context. It does not in fact refer in terms to welfare or any of its equivalents. Section 17 (2) of the Criminal Justice Act 1948 directs a court not to impose imprisonment upon a person under twenty one unless there is no other appropriate method of dealing with him. Undoubtedly the condition will release the court from the obligation imposed upon it by the earlier part of the provision. The appropriate method of dealing with young offenders is thus determined partly by their interests as distinct from the interests of the public and of society at large. It is thus not stretching the provision too much to conclude that it is designed partly at least to promote the interests of the young person. If that is so, it falls neatly into this aspect of the classification.

23 I.e. firstly, welfare treated objectively and directly (Table 1); secondly, welfare as a statutory factor (section 3 of this chapter, Table 3); finally, welfare as justification for release from a duty (this section of this chapter, Table 3).

CHAPTER 5WELFARE AND THE EXERCISE OF DISCRETIONSSection 1 - Introduction

5.1 So far consideration has been given to welfare as a concept treated by statute firstly objectively and then generally. A different, though consistent and at times overlapping, approach is to consider the part played by welfare in the exercise of a statutory discretion. This is particularly important as much of the statutory law affecting welfare is discretionary even if it is not drafted in strict discretionary form. Welfare may operate firstly to restrict the exercise of a discretion by forming the whole or part of a requirement which must be satisfied before the discretion can be exercised: that is, as a threshold requirement. Alternatively welfare may have a part to play in the exercise of the discretion.

5.2 This classification is fundamentally different from those already considered. Discretion in those cases was technically irrelevant. The examples in chapter 3 of welfare treated objectively were enforced mostly by criminal proceedings; those enforced civilly, which were to some extent regarded as an anomaly, were linked to the fulfilment of a function. It is the discretionary element in the function which is significant here; it was the objective

element which was significant for the purposes of chapter 3. Take one example. Section 1 of the Custody of Children Act 1891 confers a power on the court to decline to enforce a parental right to custody if the parent has abandoned or deserted the child. The condition contains the objective element; the judicial power falls under the discretionary classification. If the two parts are conjoined, a statutory discretion depends for its lawful exercise upon the fulfilment of a condition whose requirements protect the child objectively. This chapter looks at such provisions from the discretionary point of view.

Section 2 - Welfare as a threshold requirement

(a) General

5.3 Many of the statutory provisions affecting children confer discretions upon various bodies. Such discretions are administrative in character to the extent that they grant powers to bodies which are clearly administrative; for example, those conferred upon local authorities or Ministers of the Crown. Moreover many of the functions of juvenile courts in England¹ and most if not all of the functions of children's hearings in Scotland may also be regarded as administrative in this sense. If that proposition goes too far, functions of this nature sit uneasily, at least on the margin, between those which are administrative on the one hand and judicial on the other hand. But even that

1 E.g. those relating to the future treatment of the child once the threshold requirements have been met.

proposition is probably not necessary to establish that in any event many of the powers conferred upon the bodies cannot be exercised without the fulfilment of certain requirements which inter alia relate clearly to the welfare of children. For present purposes they are termed threshold requirements.

5.4 These requirements comprise references either to welfare as a general concept or to specific instances of welfare. The latter are unlikely to, and for the most part do not, relate to welfare or its equivalents in terms; they merely take into account considerations which cannot be interpreted other than as specific references to a child's welfare or well-being. The entries in the third column of Table 4 bear witness to this proposition.

TABLE 4

DISCRETION RESTRICTED BY WELFARE CONSIDERATIONS

Part 1 - Provisions of Acts of Parliament

<u>Section</u>	<u>Provision</u>	<u>Restrictive Features</u>
<u>Custody of Children Act 1891 (54 & 55 Vict., c.3): G.B.</u>		
1891 s.1	Power of court to decline to enforce parental right to custody.	If parent has abandoned or deserted child.

<u>Section</u>	<u>Provision</u>	<u>Restrictive Feature</u>
<u>Children and Young Persons Act 1933 (23 & 24 Geo.5, c.12): Eng.</u>		
<u>Children and Young Persons (Scotland) Act 1937 (1 Edw.8 & 1 Geo.6, c.37): Scot.</u>		
1933 s.24(4)	Power of local authority	If child is fit and
1937 s.34(4)	to grant licence to	willing to be trained
	allow persons under 16	and proper provision
	to take part in	has been made to secure
	dangerous performances.	his health and kind
		treatment.
1933 s.40(1)	Power of justice to	If he has been or is
1937 s.47(1)	authorise child or	being assaulted, ill-
	young person to be taken	treated or neglected.
	or removed to a place of	
	safety.	
<u>Education Act 1944 (7 & 8 Geo.6, c.31 c.31): Eng.</u>		
<u>Education (Scotland) Act 1962 (10 & 11 Eliz.2, c.47): Scot.</u>		
1944 s.59(1)	Power of local education	If it is prejudicial
1962 s.137(1)	authority to prohibit or	to his health or
	restrict the employment	rendering him unfit
	of a child.	to obtain the full
		benefit of his education.

<u>Section</u>	<u>Provision</u>	<u>Restrictive feature</u>
<u>Criminal Justice Act 1948 (11 & 12 Geo.6, c.58): Eng.</u>		
<u>Criminal Justice (Scotland) Act 1949 (12, 13, & 14 Geo.6, c.94): Scot.</u>		
1948 s.3(1)	Power of court in case	Having regard to the
1949 s.2(1)	of person who has	nature of the offence
	attained 17 to sub-	and the character of
	stitute probation order	the offender.
	for a sentence.	
1948 s.7(1)	Power of court to make	Having regard to the
1949 s.1	order for absolute	nature of the offence
	or in England con-	and the character of
	ditional discharge as	the offender.
	substitute for punish-	
	ment or probation.	
<u>Children Act 1948 (11 & 12 Geo.6, c.43): Eng.</u>		
<u>Social Work (Scotland) Act 1968 (1968 c.49): Scot.</u>		
1948 s.(2)(1)	Power of local authority	If there is no parent
1968 s.16(1)	to assume by resolution	or guardian or if parent
	parental rights of a	or guardian has
	child in their care.	abandoned child or is
		incapable or unfit to
		have care of the child.
1948 s.4(2)	Power of local authority	If it will be for the
1968 s.18(2)	to rescind a resolution	benefit of the child.
	assuming parental rights	
	of a child.	

<u>Section</u>	<u>Provision</u>	<u>Restrictive features</u>
1948 s.4(3)	Power of court to	If it is in the interest
1968 s.18(3)	determine a resolution	of the child.

Prison Act 1952 (15 & 16 Geo.6 & 1 Eliz. 2, c.52): Eng.

Prison (Scotland) Act 1952 (15 & 16 Geo.6 & 1 Eliz. 2, c.61):

Scot.

1952 s.44(1) Eng.	Power of Secretary of State to transfer (in	If he might with advantage be so
1952 s.32(1) Scot.	England authorise a transfer of) a person under 21 serving a sentence of imprisonment to a borstal institution.	detained.

Children Act 1958 (6 & 7 Eliz. 2, c.65): G.B.

1958 s.4(3)	Power of local authority to impose prohibition on keeping foster children.	If the premises or the person are or is not suitable or it would be detrimental to the child to be kept by that person in those premises.
1958 s.7(1)	Power of court to remove a foster child to a place of safety.	If he is being kept by an unfit person or in any detrimental premises or environment.

<u>Section</u>	<u>Provision</u>	<u>Restrictive Feature</u>
1958 s.7(1)	Power of justice to remove a foster child to a place of safety.	If there is imminent danger to the health or well-being of the child.
<u>Adoption Act 1958 (7 Eliz.2, c.5): G.B.</u>		
1958 s.41 (repealed)	Power of local authority to prohibit the receipt of certain children for adoption.	If it would be detrimental to the child.
1958 s.43(1)	Power of court to remove 'protected' children to a place of safety.	If he is being kept by an unfit person or in any detrimental premises or environment.
1958 s.43(1)	Power of justice to remove 'protected' children to a place of safety.	If there is imminent danger to the health or well-being of the child.
<u>Children and Young Persons Act 1963 (1963 c.37): G.B.</u>		
1963 s.41(2)	Power of local authority to revoke or vary licence granted to allow persons under 16 to take part in dangerous performances.	If child is no longer fit to be trained or proper provision is no longer being made to secure his health and kind treatment.

<u>Section</u>	<u>Provision</u>	<u>Restrictive Feature</u>
<u>Social Work (Scotland) Act 1968 (1968 c.49): Scot.</u>		
1968 s.17(3)	Power of local authority to allow the care of a child who is the subject of a resolution assuming parental rights to be taken over by a parent, guardian, relative or friend.	Where it appears to be for the benefit of the child.
1968 s.17(4)	Power of local authority by whom a resolution assuming parental rights was passed to receive the child back into their care.	If their intervention is necessary in the interests of the welfare of the child.
1968 s.37(4)	Power of children's hearing to require a child to be detained in a place of safety for such a period not exceeding 21 days as may be necessary.	If further detention is necessary in his own interest.
1968 s.40(2)	Power of children's hearing to consider certain cases in the absence of the child.	Where they are satisfied that it would be detrimental to the interest of the child to be present at the hearing of his case.

<u>Section</u>	<u>Provision</u>	<u>Restrictive Feature</u>
1968 s.44(6)	Power of director of social work to direct the transfer to another place of a child required to reside in a certain place.	In any case of urgent necessity in the interest of the child.
1968 s.62(3)	Power of local authority to refuse to register an establishment.	Unfitness of any person employed or inadequate establishment or premises.

Children and Young Persons Act 1969 (1969 c.54): Eng.

1969 s.1(1)	Power of local authority to bring child or young person before a juvenile court (care proceedings).	Satisfaction of the statutory conditions in s.1(2) directed towards welfare.
1969 s.1(2)	Power of court to make an order in care proceedings.	Satisfaction of the conditions in s.1(2) directed to welfare.
1969 s.21(1)	Power of court to order that a care order shall continue in force until the person obtains the age of 19 (where he is accommodated in a community home).	If it is in his interest for him to continue to be so accommodated.

<u>Section</u>	<u>Provision</u>	<u>Restrictive Feature</u>
1969 s.28(1)	Power of any person to apply to justice to authorise detention of child or young person in place of safety.	Satisfaction of the statutory conditions in s.1(2) (a) to (e).
1969 s.31(2)	Power of court to order child of 15 in care of local authority and in a community home to be removed to borstal institution.	If his behaviour is detrimental to the other children in the community home.

Guardianship of Minors Act 1971 (1971 c.3): Eng.

Guardianship of Infants Act 1886 (49 & 50 Vict., c.27): Scot.

Guardianship of Infants Act 1925 (15 & 16 Geo.5, c.45): Scot.

1971 s.6	Power of the court to	If it is for the welfare
1886 s.6	remove testamentary or statutory guardian and to substitute another guardian.	of the child.

Guardianship Act 1973 (1973 c.29): G.B.

1973 s.1(3): Eng.	Power of court to make order regarding the matters in difference between a minor's father and mother.	Where a minor's father and mother disagree on any point affecting his welfare.
1973 s.10(3): Scot.		

<u>Section</u>	<u>Provision</u>	<u>Restrictive Feature</u>
<u>Children Act 1975 (1975 c.72) : Scot.</u>		
<u>Adoption Act 1976 (1976 c.36) : Eng.</u>		
1975 s.12(1) (b)(ii)	Power to dispense	If the person has
1976 s.16(1) (b)(ii)	with agreement to the making of an adoption order	abandoned, neglected or ill-treated the child.

Part 2 - Provisions of Statutory Instruments

Guardianship of Infants (Summary Jurisdiction) Rules

1925 (S.R. & O. 1925 No.960) : Eng.

1925 r.3(1) 1925 r.4(4)	Power of court to hear proceedings in camera.	If it is expedient in the interests of the child.
----------------------------	--------------------------------------------------	---------------------------------------------------------

Boarding-out of Children Regulations 1955 (S.I.1955 No.
1377) : Eng.

1955 r.5(1)	Power of supervising visitor to remove child from foster- parent forthwith.	If his health, safety or morals are endangered.
-------------	--------------------------------------------------------------------------------------	-------------------------------------------------------

Borstal Rules 1964 (S.I. 1964 No.387) : Eng.

1964 r.42(1)	Power of Governor to arrange for the inmate's removal from association with other inmates.	Where desirable in his own interests.
--------------	--------------------------------------------------------------------------------------------------------	------------------------------------------

<u>Section</u>	<u>Provision</u>	<u>Restrictive Feature</u>
<u>Magistrates' Courts (Children and Young Persons) Rules</u>		
<u>1970 (S.I. 1970 No.179) : Eng.</u>		
1970 r.10(1) (e)	Power of court to require child or young person or parent or guardian to withdraw from court after finding guilty of offence.	If necessary in the interests of the child.
1970 r.18(1)	Power of court to hear the whole or part of the evidence in the absence of the infant in certain circumstances.	If it is in the interests of the infant.
1970 r.20(1) (d)	Power of court to require the infant or his parent or guardian to withdraw from court after applicant's case has been proved.	If necessary in the interests of the infant.

Act of Sederunt (Social Work) (Sheriff Court Procedure
Rules) 1971 (S.I. 1971 No.92) : Scot.

1971 r.8(3)	Power of sheriff to hear evidence in the absence of the child.	Where it is in the interests of the child.
-------------	----------------------------------------------------------------------	--------------------------------------------------

Children's Hearings (Scotland) Rules 1971 (S.I. 1971No.492 : Scot.

1971 r.11(3)	Power of the chairman of a children's hearing to exclude a representative from the hearing.	If a representative is persisting in behaviour which is likely to be detrimental to the interests of the child.
--------------	---------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------

Reporter's Duties and Transmission of Information etc.(Scotland) Rules 1971 (S.I. 1971 No.525) : Scot.

1971 r.4(1)(b)	Power of reporter to authorise the person in charge of the place of safety to liberate a child.	If further detention of the child is unnecessary in his interest.
----------------	-------------------------------------------------------------------------------------------------	-------------------------------------------------------------------

(b) The nature of the threshold requirements

5.5 The provisions set out in Table 4 may be looked at in several different ways. It is concerned only with statutory powers. Powers may be conferred so as to be exercised in a more or less discretionary fashion: ranging from an unfettered or absolute discretion, through those which are restricted in relation to welfare, however

expressed, or other considerations, to those which are so narrowly delimited as to afford little or no scope for choice except in relation to the construction or application of the precise provisions. Chapters 8 to 10 deal with the latter aspect and, in particular, with how interpretation may be affected by welfare as a policy. This chapter is concerned with the other two situations. Table 4 contains examples of statutory discretions which are restricted inter alia in relation to the welfare of children; Table 5 exemplifies statutory discretions which are not restricted as to welfare but which may be limited in other ways.

5.6 The powers classified in Table 4 fall into two fundamental categories. Welfare considerations restrict the exercise of the discretion either retrospectively or prospectively. There are other possible categories; for example, the degree of generality or objectivity of welfare but they are not presently relevant. The most significant aspect is whether the existing welfare situation, based upon past conduct, is a ground for the exercise of the power or whether the future well-being of the child is at once the present justification for and also the principal objective of the use of the discretion.

5.7 Where proof of an existing situation is a requirement for the exercise of a power, there can be little doubt that this constitutes a threshold requirement. On the other hand at first sight it seems odd that the future welfare of the child can be such a requirement. It is understandable however if the discretion is regarded as a continuous

process, not easily susceptible to compartmentalisation, so that in this sense the object of the exercise, not just the protection of the child but also the promotion of his welfare, operates partially to justify its use. Thus the end justifies the means.

5.8 To some extent this crystallises a general dilemma facing the law of children. If the grounds for interfering with existing parental relationships are restricted to an examination of the status quo, there is no jurisprudential problem. As soon as the future welfare of the child becomes a ground for such interference, a subjective prognostication of what will or may be good for the child becomes the criterion. No doubt such a prediction will usually be founded upon the existing factual situation. But the future welfare of a child must by its very nature be largely speculative.

5.9 Table 4 demonstrates how far this distinction is reflected in legislation of the British Parliament. To some extent that legislation has hesitated to accept the full consequences of the distinction: hence in many cases the exercise of a statutory discretion turns upon a parental rights approach rather than the prospective welfare approach. The correct approach is governed, naturally, by the precise words of the statute but the tense of the relevant verb is not necessarily the clue to the meaning of the provision. The future tense normally indicates the prospective welfare approach but there is no guarantee that the present tense necessarily postulates

a forfeiture of the parental rights approach. Nor is it true that courts are empowered to deal only with the forfeiture of parental rights and administrative bodies only with prospective welfare. There is no overall pattern of this nature. Each provision seems to have been considered pragmatically, as one would expect of a British Parliament, and not in purely logical terms.

5.10 One of the more complex provisions in Table 4 turns upon a consideration of the status quo in conjunction with an element of speculation about the child's future well-being. Consider, for example, section 1(2) of the Children and Young Persons Act 1969 and section 32(2) of the Social Work (Scotland) Act 1968. They set out respectively the requirements for care proceedings² and those identifying the children in need of compulsory measures of care.³ Once these requirements have been satisfied, the relevant machinery can be set in motion.⁴ Paragraphs (a) and (c) to (f) of section 1(2) of the 1969 Act and paragraphs (a), (b) and (d) to (h) of section 32(2) of the 1968 Act refer to existing fact situations capable of proof in the ordinary way. On the other hand paragraphs (b) and (bb) of section 1(2) of the 1969 Act and paragraph (c) of section 32(2) of the 1968 Act introduce an element of prospective probability. The former, paragraph (b), enables

2 See Children and Young Persons Act 1969, s.1(6).

3 See Social Work (Scotland) Act 1968, s.32(1).

4 See Part I of the 1969 Act and Part III of the 1968 Act.

an order under section 1 of the 1969 Act to be made if the court is satisfied that it is probable that the proper development of the child or young person will be avoidably prevented or neglected or that he will be ill-treated, having regard to the fact that the court or another court has found that that condition was satisfied in the case of another child or young person who was a member of the household to which he belongs. Similarly a child may be in need of compulsory measures of care under section 32(2) (c) of the 1968 Act where lack of parental care causing the child to fall into bad associations or be exposed to moral danger is likely to cause him unnecessary suffering or seriously to impair his health or development. It is significant that the English legislation requires the fulfilment of an additional condition for the purposes of section 1(2) of the 1969 Act, namely "that he is in need of care or control which he is unlikely to receive unless the court makes an order under this section."

5.11 There is one element common to paragraph (b) of and the additional condition in section 1(2) of the 1969 Act and paragraph (c) of section 32(2) of the 1968 Act. They enable parental rights to be restricted by reason of the probability or likelihood that the continuation of the status quo will affect detrimentally the future welfare or interests of the child. This is clearly the effect of the two nominated paragraphs. It is perhaps less clearly true of the additional condition in section 1(2) of the 1969 Act. In that situation the court in England is directed to

consider the likelihood of the child receiving proper care and control. Anticipation of future parental conduct will presumably be based to some extent upon how parents have behaved in the past towards their children. It must however be recalled that, even if the court is satisfied that one of the nominated conditions and the additional condition have been fulfilled, it is then merely open to the court to make an order under section 1 of the 1969 Act. The same is true of satisfying the criteria in section 32(2) of the 1968 Act for children in need of compulsory measures of care. The examples considered so far, therefore, although they direct an investigation into the future welfare of the child, do so only to protect the child's future welfare. In no sense do they promote his future well-being.

5.12 Most of the other examples in Table 4 are less complicated. Sections 1(1) of the 1969 Act and 32(2) of the 1968 Act are directed very generally to the lack or inadequacy of parental care or control. This is also true of section 2(1) of the Children Act 1948, section 16(1) of the Social Work (Scotland) Act 1968, section 12(1)(b)(ii) of the Children Act 1975, and even of section 1 of the Custody of Children Act 1891. The future welfare of the child, however, is not relevant to the threshold requirements for the exercise of these statutory discretions. The assumption of parental rights by local authority resolution, the dispensation with the agreement of a parent to an adoption order or a refusal to enforce

a parental right to custody may be exercised only if the present integrity of the child's welfare is prejudiced by the lack or inadequacy of parental care or control.⁵

5.13 Even simpler to analyse and classify are various powers directed towards the child and his environment and towards the child involved in legal proceedings. For example, the provisions of the Children Act 1958 which protect foster children take into account the suitability or otherwise not only of the persons involved but also of the premises and general environment in which the child will find himself. The same is true of children protected by the adoption legislation⁶ and those whose educational integrity is safeguarded by the education legislation.⁷

5.14 Children affected by proceedings of one type or another may be protected by the exercise of an appropriate discretion. On the whole these are to be found in subordinate legislation. Rule 8(3) of the Act of Sederunt (Social Work) (Sheriff Court Procedure Rules) 1971 enables

5 That conclusion is based only upon a static view of the statutes : these provisions have been judicially interpreted and a degree of dynamism has been introduced.

6 Particularly ss.4(3) and 7(1).

7 Within the meaning of s.37(1) of the Adoption Act 1958 or s.32 of the Adoption Act 1976.

8 Adoption Act 1958, Part IV; Adoption Act 1976, Part III.

9 E.g. Education Act 1944, s.59(1); Education (Scotland) Act 1962, s.137(1).

the sheriff to hear evidence in the absence of the child when that is in the interests of the child. That formula is typical.¹⁰ A greater degree of specification is unusual in this context, although rule 11(3) of the Children's Hearings (Scotland) Rules 1971 authorises the chairman of a children's hearing to exclude a representative if that person is persisting in behaviour which is likely to be detrimental to the interests of the child. The criterion however is fundamentally the same, namely the interests of the child. It is interesting that the latter example introduces an element of anticipation of the child's future interests. In doing so however the rule merely seeks immediately to protect the child. This is an obvious example of the future being the form of the protection afforded to the child, while the present is effectively the substance of the protection. Thus the word "likely" probably adds very little to the rule.

(c) The question of choice

5.15 The foregoing examples of threshold requirements are reasonably precise in the criteria to which they refer, although sometimes they are fairly general. The role which certain other criteria play is less clear; perhaps they are threshold requirements only in a very marginal sense. It is significant that examples of such criteria come from the control and regulation of penal powers. The problem is whether the criteria are conditions which must be satisfied before the power can be exercised or objectives to which Parliament has directed that attention should be paid.

5.16 Sections 3(1) and 7(1) of the Criminal Justice Act 1948

10 See e.g. Guardianship of Infants (Summary Jurisdiction) Rules 1925, rr. 3(1) and 4(4); Magistrates' Courts (Children and Young Persons) Rules 1970, rr. 10(1)(e) and 20(1)(d).

11

employ a formula already analysed.¹¹ The court is empowered to substitute a probation order for a sentence or to make an order for absolute discharge as a substitute for punishment or probation. The power is qualified by the statutory direction to the court to have regard to the nature of the offence and the character of the offender. The nature of the offence and the character of the offender are related to presently discernible circumstances. But since the court is given an alternative method of dealing with the offender, a future element is also injected into the process. The statutory criteria represent the springboard, as it were, for the choice confronting the court.

5.17 An element of choice is also implicit in rule 42(1) of the Borstal Rules 1964. The Governor of a Borstal institution is thereby authorised to arrange for the removal of an inmate from association with other inmates where it is desirable in his own interests. The desirability of such a removal is probably a condition which must be satisfied before the power can be exercised. At the same time, on an analytical but not a purely temporal basis, the desirability of such a removal involves a decision founded upon a choice of whether the existing association would be preferable in the interests of the inmate himself. In this sense the Governor must face a choice, based upon existing circumstances but extended into the future, by balancing the inmate's best interests against his present difficulties. The scheme or formula of the rule does not make this approach obvious. It seems arguable nevertheless that the deceptive simplicity of rule 42(1) conceals the analytical complexity of the decision facing the Governor. The qualification added

11 Para. 4.21.

to the power, namely that its exercise should be desirable in the inmate's interests, thus operates in at least two different ways.

5.18 Finally in this context section 32(1) of the Prison (Scotland) Act 1952 enables the Secretary of State to transfer a person under twenty one serving a sentence of imprisonment to a Borstal institution "if he might with advantage be so detained." The minister has an undoubted choice: keep the offender in prison or detain him in Borstal. Parliament might have employed the formula used in the example from the Criminal Justice Act 1948.¹² It was decided however to use a drafting device which, it is suggested, encapsulates a much more powerful qualification. The power is available "if he might with advantage be so detained". The phraseology of the condition is couched in futuristic terms and the minister is bound to ascertain where the balance of advantage lies. His statutory concern is not with the existing situation but with the future of the inmate. Nevertheless the existing situation must in practical terms be the foundation of an intelligible decision. Parliament went further than to direct the minister to have regard to the advantages of Borstal. The duty is much more positively to bring about the result which would be best for the child. That goes slightly beyond the specific requirement of the Act

12 Particularly ss.3(1) and 7(1).

and to that extent it is a misinterpretation of the provision. The overemphasis upon the "best result" is intended merely to draw attention to the distinctive approach of Parliament in this instance.

5.19 The range of approaches contained in the Table 4 examples becomes apparent. Some restrictions upon statutory discretions represent conditions to be fulfilled before the power can be exercised, namely threshold requirements in the terms already postulated. Other restrictions simply indicate factors which Parliament considers it desirable to take into account. A third approach is to indicate, at times rather obliquely, a desirable objective of the exercise of the discretion. An element of choice is thus introduced. The final approach may be to conjoin the restriction as a jurisdictional requirement with the same restriction as a future objective. The possible lines of approach are thus varied and various.

(d) The problem of future welfare

5.20 One of the two fundamental categories into which the powers set out in Table 4 may be classified is the future welfare of the child as a ground for interference with existing parental relationships. An analysis of this classification is the consequence of the preceding paragraphs. Future welfare is both the most difficult and the most rewarding aspect of welfare to analyse. It is increasing in significance as time goes on. The distinction between the relevance of existing and future

welfare to the exercise of a statutory discretion is twofold. If the present welfare of a child is being detrimentally prejudiced, largely a question of interpreting existing circumstances, the way may be open to exercise a discretion. The decision in that event is simple : whether or not to exercise the discretion or use the available power. There is no statutory obligation to take any welfare considerations into account or aim at a particular welfare objective. The first point of distinction is thus factual.

5.21 Future welfare, it should be recalled, involves an element of speculation. The second point of distinction is the nature of the choice presented by Parliament. There is clearly an element of choice in the exercise of any discretion; whether or not to exercise it. But where there is the possibility of a substantial alternative, the choice is no longer simply whether or not to use the power. A qualitative requirement is added by statute. Which alternative will or is more likely to produce a stated result? In this sense the result becomes a condition of the exercise of the power to achieve that very objective. Thus existing and future welfare are distinguishable in terms of the factual basis of existing welfare compared with the speculative nature of future welfare and by reason of the differing nature of the choices open to the decision-maker.

5.22 The nature of choice as the determinant throws further light upon the distinction between existing and

future welfare. Statutory references to existing welfare tend to be phrased in relatively objective terms; for example, abandonment, parental unfitness, danger to health, detrimental environment or premises. Some of these expressions are sufficiently general to cause interpretational problems in an individual set of circumstances. But they have the benefit of a degree of precision which is lacking when the reference to welfare relates to future welfare. In that context the tendency is for Parliament to use words such as "welfare" or "interests". This is surely no accident. It is possible for the legislature to conceive of circumstances in which it would be justifiable to permit the exercise of a discretionary power aimed at protecting a child by interfering with existing parental relationships. Indeed the removal of a child from his parents against their will may arguably be a matter of such significance, not only for the parents but also for the child, that it should be as closely regulated by objectively identifiable legal norms as the deprivation of liberty under the criminal law. That view would be inconsistent with the contention that a child should be able to be removed from his parents simply because it would be of advantage to his future well-being. The law in this country has hesitated to acknowledge the latter proposition. If this is true, one would not expect to find the promotion of a child's future welfare forming the threshold requirement for the exercise of a statutory discretion.

5.23 It is not inconsistent with these propositions that future welfare has a role to play in the exercise of a discretion. That concept tends to apply however once the way is open for the discretion to be exercised, not as a condition for its exercise. This fundamental distinction must not be pressed too far. The preceding paragraphs show how analytically complicated are some of the statutory provisions. Nevertheless there is sufficient evidence to justify these propositions; the marginal problems cannot be denied.

5.24 The instance in Table 4 selected to draw specific attention to the role of future welfare was section 32(1) of the Prison (Scotland) Act 1952. The two distinctive criteria were present : the generality of the reference to welfare, namely "advantage", and the existence of a substantial alternative for the decision-maker, namely, detention in prison or in a Borstal institution. The nature of the choice is not so starkly obvious in all the examples in Table 4 but it will be found on closer examination that a substantial alternative exists. Section 44(6) of the Social Work (Scotland) Act 1968, for example, enables a director of social work, in case of urgent necessity in the interests of the child, to direct the transfer to another place of a child required to live in a certain place. This is an instance which can probably be approached in two ways. The test of "urgent necessity" applies to existing circumstances and hence the criterion is

existing welfare. But the phraseology is not such that an element of future welfare can necessarily be ruled out. The director is given a real choice. He may change, in effect, the place of residence of the child. The alternatives are thus the range of residences in which this child may be housed. The selection of the appropriate residence will no doubt depend upon how the interests of the child are at that moment conceived.

5.25 On the other hand in section 37(4) of the 1968 Act the choice is limited but the relevance to future welfare more obvious. A children's hearing is thereby empowered to require a child to be detained in a place of safety for a limited period "if further detention is necessary in his own interests". The choice is detention in a place of safety or not. The only alternative, which is not a substantial alternative as contemplated here, is presumably the status quo. The power of detention can be exercised only if it is necessary in the child's interests. In this sense the necessity of further detention is a threshold requirement for the exercise of the power. But the requirement of "further detention" being "necessary in his own interests" introduces an element of future welfare, as in a practical sense the decision must be based to some extent upon likely future considerations. The need for further detention must be assessed in the light of present circumstances in relation to likely developments affecting the child's interests. This example in particular shows

the difficulties in determining the meaning of the words used by Parliament, and hence their legislative intention, when conceptually complicated words are used in close proximity in a syntactical context which does little to help to clarify the meaning.

5.26 Four examples of statutory powers affecting the assumption of parental rights by a local authority demonstrate the role of future welfare. The assumption of parental rights by resolution of a local authority is governed by section 16(1) of the Social Work (Scotland) Act 1968. The threshold requirements which must be satisfied before the power can be exercised are objectively identifiable and founded upon present or existing circumstances. There is no suggestion that parental rights may be assumed simply because to do so would be of benefit to the child. To alter the status quo brought about by a local authority assumption of parental rights is a different matter. Section 17(3) enables a local authority with parental rights to permit the care of the relevant child to be taken over by a parent, guardian, relative or friend, "where it appears to be for the benefit of the child".¹³ The logic of the provision, its grammatical structure and the definite use of the word "for" indicate that the child's future welfare is the reason for and the aim of the exercise of the power. Section 17(4) authorises a local authority with parental

13 Emphasis added.

rights to receive the child back into their care "if their intervention is necessary in the interests of the welfare of the child". The function and relevance of future welfare are less clearly rehearsed by the legislature in section 17(4) than in section 17(3) but it is suggested that fundamentally the same analysis is true of both provisions.

5.27 Section 18(2) and (3) also deals with local authority parental rights. The subsections provide for similar situations but the precise words used to qualify the discretion differ, much as in section 17(3) and (4). Section 18(2) authorises a local authority with parental rights to rescind their resolution assuming those rights "if it will be for the benefit of the child". Not only is the word "for" used but the condition is expressed in the future tense. Nothing could indicate more clearly a reference to future welfare. Section 18(3) enables a court to determine a resolution of a local authority assuming parental rights "if it is in the interests of the child". The circumstances contemplated by the two subsections are essentially the same; the differences are technical. It is probably safe to assume that the intention of Parliament was the same in both cases. Why the phraseological difference? The answer is not known but it does not matter. It is suggested that section 18(3) also contemplates future welfare. If the condition is extended by the words "to do so", the meaning is not distorted. Rather it is clarified and the reference to future welfare is fully justified.

5.28 It is regrettable that Parliament has decided, for whatever reason, not to use uniform language in uniform circumstances. The reason may be that welfare and similar expressions have been scattered throughout so many different statutes over a period of so many years and in countless different ways with complex nuances of meaning that the logic and pattern are not easy to uncover. Three further references however should be made to specific provisions to demonstrate to a very limited extent a uniformity of language. Section 4(3) of the Children Act 1958 and section 41 of the Adoption Act 1958¹⁴ empower a local authority to prohibit respectively the keeping of foster children in certain circumstances and the receipt of certain children for adoption. A condition common to both provisions is "if it would be detrimental to the child". The language is drafted in future terms and there can be no doubt about the reference to the detriment to the future well-being of the child in each case. Finally section 6 of the Guardianship of Minors Act 1971, a relatively simple and open-ended provision, enables a court to remove a testamentary or statutory guardian and to substitute another. The condition to be satisfied is "if it is for the welfare of the child". It has already been suggested that the word "for" indicates an element of future welfare. This would be particularly true for the appointment of a substituted guardian. It must in the nature of the appointment be speculative whether he will prove

14 Before its repeal by the 1975 Act.

satisfactory. This argument does not, it is suggested, apply to the removal of an existing guardian. In that event the court's concern will be to remove an unsatisfactory guardian and the criteria are likely to be the past conduct and behaviour of the guardian. Conceivably, it must be conceded, the likelihood of the continuation of such detrimental conduct may also be a relevant factor. But taken as a whole section 6 of the 1971 Act provides for the future well-being of the child.

Section 3 - The exercise of a discretion

(a) Introduction

5.29 So far this chapter has been concerned to consider welfare, either generally or objectively identified, as a requirement sine qua non a statutory power is available. It may do so either as a threshold requirement stricto sensu or more obliquely as the statutory objective of the exercise of the power. All the examples of this in Table 4 contain two fundamental parts : a discretion and a restriction. If the restriction operates as the objective of the exercise of the discretion, normally in relation to future welfare, the body upon whom the power is conferred must give effect to that statutory discretion. But if Parliament has not spelled out the objective of the discretion, even where threshold requirements must be satisfied, the exercise of the discretion would appear to be unlimited and the way in which the discretion may be exercised open-ended. This

situation should be distinguished from the earlier one where there is a need to fulfil requirements before the power can be exercised in the first place. This section is concerned only with the discretionary elements of the provision.

5.30 Take section 40(1) of the Children and Young Persons Act 1933 as an example. This enables a justice of the peace, if it appears to him that there is reasonable cause to suspect that a child or young person has been or is being assaulted, ill-treated or neglected in a manner likely to cause him unnecessary suffering or injury to health,¹⁵ to issue a warrant authorising a search for the child or young person. He is further enabled, if his suspicions are well-founded, to issue a warrant authorising the child or young person to be taken to a place of safety. The analytical pattern of section 40(1) is clear. Once the condition, which objectively prescribes circumstances referring directly to the welfare of the child, has been fulfilled, the way is open for the justice to issue the respective warrants. This condition takes the form of a threshold requirement. There is no restriction in section 40(1) affecting the way in which the power should be exercised. In this sense the exercise of the statutory discretion is open-ended.¹⁶

15 It is interesting how this language reflects that also used in section 1 of that Act.

16 At least on the face of the provision. Paras.5.38 to 5.49. discuss the general possibility of other restrictions.

The pattern of section 40(1) is typical and is repeated frequently in the examples in Table 4.

TABLE 5

DISCRETIONS NOT RESTRICTED BY WELFARE CONSIDERATIONS

Part 1 - Provisions of Acts of Parliament

<u>Section</u>	<u>Provision</u>
<u>Conjugal Rights (Scotland) Amendment Act 1861 (24 & 25 Vict., c.86) : Scot.</u>	
1861 s.9	Power of court to make such provision as it shall seem just and proper with respect to the custody, maintenance and education of any pupil children of the marriage to which the action relates.
<u>Custody of Children Act 1891 (54 & 55 Vict., c.3) : G.B.</u>	
1891 s.1	Power of court to decline application for production of a child by an unfit or delinquent parent.
<u>Guardianship (Refugee Children) Act 1944 (7 & 8 Geo.6, c.8) : G.B.</u>	
1944 s.1(1):	Power of Secretary of State to appoint
Eng.	
1944 s.2(1):	guardian (tutor in Scotland) in certain
Scot.	circumstances.

SectionProvision

Criminal Justice Act 1948 (11 & 12 Geo.6, c.58) : Eng.

Criminal Justice (Scotland) Act 1949 (12, 13 & 14 Geo.6, c.94) : Scot.

1948 s.3(1) Power of court to make a probation order
1949 s.2(1) instead of sentencing a person 17 or
over convicted of an offence.

1948 s.7(1) Power of court to make an order discharging
1949 s.1 absolutely (or in England conditionally) a
person convicted of an offence.

1948 s.20 Power of court to substitute Borstal training
1949 s.20 for any other sentence in case of a person
between 15 and 21 convicted on indictment of
an offence punishable with imprisonment.

Affiliation Proceedings Act 1957 (5 & 6 Eliz.2, c.55) : Eng.

1957 s.5(4) Power of two justices to appoint by order
some person (with his consent) to have the
custody of a child in respect of whom an
affiliation order has been made.

Matrimonial Proceedings (Magistrates' Courts) Act 1960
(8 & 9 Eliz. 2, c.48): Eng.

1960 s.2(1)(d) Power of court to make a matrimonial order
providing for the legal custody of a child
of the family under 16.

SectionProvision

1960 s.2(1)(e) Power of court to make a matrimonial order providing for the committal of the care of a child to the local authority.

1960 s.2(1)(f) Power of court to make a matrimonial order providing for the independent supervision of a child.

1960 s.2(1)(g) Power of court to make a matrimonial order providing for access by a party or any other person who is a parent.

Matrimonial Proceedings (Children) Act 1958(6 & 7 Eliz.2,c.40): Scot.
Matrimonial Causes Act 1973 (1973 c.18): Eng.

1958 s.10(1) Power of court to commit the care of
 1973 s.43(1) a child to the local authority (or an individual in Scotland).

1958 s.12(1) Power of court to provide for the
 1973 s.44(1) supervision of any child committed to the custody of any person.

1958 s.13(1) Power of court in certain circumstances to grant interim interdict prohibiting the removal

SectionProvision

furth of Scotland or out of the control of the person in whose custody the child is.

Social Work (Scotland) Act 1968 (1968 c.49): Scot.

1968 s.65(1) Power of local authority to remove forthwith from an establishment all or any of the persons for whom accommodation is being provided therein.

Family Law Reform Act 1969 (1969 c.46) : Eng.

1969 s.7(2) Power of court to make an order committing the care of a ward of court to a local authority.

1969 s.7(4) Power of court to order that a ward of court will be under the supervision of a welfare officer or of a local authority.

1969 s.20(1) Power of court to give a direction for the use of blood tests for establishing or otherwise paternity.

Children and Young Persons Act 1969 (1969 c.54) : Eng.

1969 s.1(3) Powers of the juvenile court in care proceedings.

1969 s.12(2) Power of the court to include in a supervision order requirements to comply with certain directions of the supervisor.

SectionProvision

1969 s.15(1) Power of the court to vary or discharge supervision orders.

1969 s.21(2) Power of the court to substitute a supervision order for a care order.

Guardianship of Minors Act 1971 (1971 c.3) : Eng.

Guardianship of Infants Act 1886 (49 & 50 Vict., c.27) : Scot.

Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c.45) : Scot.

1971 s.3(1) Power of court to appoint guardian to
1925 s.4(1) act jointly with mother.

1971 s.3(2) Power of court to appoint guardian to
1925 s.4(2) act jointly with father.

1971 s.4(4)(b) Power of court to appoint a guardian to
1925 s.5(4) act with a parent or alone.

1971 s.5(1) Power of court to appoint a guardian of
1925 s.4(2A) a minor without a parent or guardian.

1971 s.7 Power of court to settle disputes between
1925 s.6 joint guardians.

Guardianship Act 1973 (1973 c.29) : G.B.

1973 s.2(2) : Power of court to order that a minor
Eng. the subject of a custody order under the

SectionProvision

1973 s.11(1) : Guardianship Acts shall be under the
 Scot.
 supervision of a local authority (or probation
 officer in England) or to commit the care
 of the minor to a local authority.

Matrimonial Causes Act 1973 (1973 c.18) : Eng.

1973 s.42(1) Power of court to make an order for the
 custody and education of any child of the
 family under 18 in matrimonial proceedings.

1973 s.42(3) Power of court to declare that either
 party to the marriage is unfit to have
 custody.

Children Act 1975 (1975 c.72) : Scot.Adoption Act 1976 (1976 c.36) : Eng.

1975 s.8(7) Power of court to insert terms and
 1976 s.12(6) conditions in an adoption order.

1975 s.12(1) Power of court to dispense with agreement
 (b)(ii)
 1976 s.16(1) to an adoption order.
 (b)(ii)

1975 s.19 Power of court to vest legal custody in
 1976 s.25 applicants for adoption for a probationary
 period.

Part 2 - Provisions of Statutory Instruments

Rule

Provision

Magistrates' Courts (Children and Young Persons) Rules

1970 (S.I. 1970 No.1792) : Eng.

1970 r.18(2) Power of the court to require a parent
or guardian to withdraw from the court
while the infant gives evidence or makes
a statement in care proceedings.

Act of Sederunt (Social Work) (Sheriff Court Procedure
Rules) 1971 (S.I. 1971 No.92) : Scot.

1971 r.8(4) Power of sheriff to exclude the parent
while the child is giving evidence.

Children's Hearings (Scotland) Rules 1971 (S.I. No.492) :
Scot.

1971 r.9(1) Discretion conferred upon the chairman
to determine the procedure at any children's
hearing.

5.31 A different pattern is discernible in the
examples in Table 5. That Table is intended to emphasise
the discretionary aspect of the provisions. Most of the
examples in that Table are on the face of them unrestricted
in terms. Some however tend to follow the pattern of

section 40(1) of the Children and Young Persons Act 1933. In that case the discretion must be carefully distinguished from the restriction. Section 12(1)(b) (ii) of the Children Act 1975 confers a discretion upon the court to dispense with the agreement of a parent but only on the fulfilment of certain conditions : hence the inclusion of that section and also of section 40(1) of the 1933 Act in Table 4. Some examples in Table 5 also contain limiting factors. It is suggested however that they are more descriptive than prescriptive in the sense of threshold requirements. No discretion however can be completely absolute; otherwise it would not exist.¹⁷

(b) Discretions and their context

5.32 Every discretion is limited by the context in which it operates. For example, sections 10(1) and 12(1) of the Matrimonial Proceedings (Children) Act 1958 respectively enable the court in a consistorial context to commit the care of a child to an individual and to provide for the child's supervision. These powers are ex facie unrestricted. They are however likely to be affected by the general context in which they are intended to operate. Their statutory derivative is section 9 of the Conjugal Rights (Scotland) Amendment Act 1861. It would be reasonable to expect that the 1958 Act would be interpreted in a way consistent with the principles of the 1861 Act. It may therefore be concluded that sections 10(1) and 12(1) of the 1958 Act are merely enabling provisions. They do not include any threshold

17 In the sense that it would lack a context in which to operate.

requirements nor do they specify the objective of the exercise of the power.

5.33 It might be argued, in contradiction of this conclusion, that the introductory words are more than a type of preamble to the conferment of the power and rather in the nature of a threshold requirement. The power in section 10(1) is preceded by the words "where it appears to the court as respects any child for whose custody, maintenance and education it has jurisdiction to make provision in connection with an action for divorce, nullity of marriage or separation brought before it that there are exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parties to the marriage." These words are a mere description of the situation in which the power applies; in other words, they set the context of the exercise of the discretion. The reference to "exceptional circumstances making it impracticable or undesirable for the child to be entrusted to either of the parties to the marriage" contains very obliquely an inference of parental inadequacy which may be detrimental to the child's welfare. But this reference is largely a reflection of the context of the exercise of the power; namely the committal of a child to the care of an individual or a local authority. It is thus more descriptive of the power rather than a restriction upon its exercise. Ultimately the issue is one of fact and largely a matter of degree.

5.34 Section 12(1) contains similar words in advance of the conferment of the power. It is suggested that the introductory words in section 12(1) are probably more clearly descriptive than those in section 10(1). They simply set the context. It is probably not a distortion to paraphrase them as follows:-

"If it appears desirable to the court to do so, it may in exceptional circumstances place the child under supervision."

This represents the essence of the subsection after the purely descriptive matter has been removed. The largely unfettered quality of the discretion becomes manifest. The same fundamental analysis is thus applicable to both section 12(1) and section 10(1) of the 1958 Act.

5.35 Similar considerations apply to section 20(1) (d) to (g) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960. These paragraphs describe the powers available to a magistrates' court in matrimonial proceedings. Indeed paragraphs (e) and (f) merely reflect the powers contained in sections 10(1) and 12(1) of the Matrimonial Proceedings (Children) Act 1958¹⁸ in a different context. The scheme of the 1960 Act itself emphasises the relevance of this analysis. Section 1 is headed "Jurisdiction of magistrates' courts in matrimonial proceedings" and the heading represents a close analogy to threshold requirements in the sense used in this chapter. It should however be noted that the word

18 Now to be found for England in the Matrimonial Proceedings Act 1973, ss.43 and 44.

"jurisdiction" in the heading of the section is used slightly more broadly than "threshold" in this chapter by virtue of the provisions in section 1(3).¹⁹ Section 2, on the other hand, deals fundamentally with the powers of the magistrates' court after the requirements of section 1 have been satisfied. Section 2 of the 1960 Act thus describes the powers in the same way as sections 10(1) and 12(1) of the 1958 Act and the additional provisions in section 2 of the 1960 Act play a role similar to that of the introductory words in the provisions of the 1958 Act. The formal layout of the statute thus bears witness to the distinction drawn between the requirements for the exercise of the power and the exercise of the power itself.

5.36 Section 7(2) and (4) of the Family Law Reform Act 1969 confers powers upon the court in wardship proceedings similar to those conferred in matrimonial or consistorial proceedings by sections 10(1) and 12(1) of the Matrimonial Proceedings (Children) Act 1958. The same analysis applies and there is no need to rehearse the arguments.²⁰ Section 20(1) of the 1969 Act is however somewhat different. It confers upon the court a power to require the use of blood tests in determining paternity. The provision describes the proceedings in which the power is available and states the use which may be made of the blood tests. The last requirement may operate as a limitation upon the power by reference to its objective. It does not however limit the way in which the power may be exercised once the circumstances for its exercise have been established. There is no statutory restriction upon or reference to the factors to be taken into account in the exercise of the power. In that sense the discretion is largely unfettered.

19 Which deals with jurisdiction in the sense of judicial power over the defendant qua litigant.

20 The same is true of the Guardianship Act 1973, ss.2 (2) and 11(1) in relation to a minor who is the subject of a custody order.

5.37 That conclusion is manifestly true of the powers in the Guardianship Acts set out in Table 5. They are concerned largely with the appointment of guardians in various circumstances. The relevant factors governing the exercise of the discretion are not described, prescribed or even implied in the sections which actually confer the relevant powers. The sections merely describe the circumstances in which the powers may be exercised; there is no question of the sections prescribing threshold or other requirements. Such powers are clearly unrestricted. These comments apply also to section 8(7) of the Children Act 1975 and before its repeal, to section 8(1) of the Adoption Act 1958 which enable the court respectively to impose such terms and conditions in an adoption order as it may think fit and to postpone the determination of an adoption application by giving the applicant temporary custody.

(c) Restrictions upon the exercise of discretions

5.38 Section 2 of this chapter considered the restrictions upon the discretions conferred by statute in the form of threshold and similar requirements. The earlier paragraphs of this section of this chapter analysed the restrictions imposed upon the exercise of a discretion by the context of the power and went on to consider examples of apparently unfettered discretions. So far each statutory provision has been considered in relation to the specific terms in which it has been drafted. That

approach is frequently too narrow, for many of the statutes affecting children interlock in a remarkable way and the exercise of an apparently unfettered discretion may prove to be more limited than the terms of the section suggest.

5.39 The integral relationship between sections 1 and 2 of the Matrimonial Proceedings (Magistrates' Courts) Act 1960 has already been noticed.²¹ Section 2 contains the various powers available to the court; section 1 sets out the threshold requirements which must be satisfied before the powers can be exercised. The same is true of subsections (1) and (3) of section 1 of the Children and Young Persons Act 1969 in relation to subsection (2) of that section. In that instance the relationship exists between different subsections in one section. That is a closer nexus than one between sections in the same part of a statute, as in the other example.

5.40 That statutory structure is not uncommon. Of particular significance is the relevance to the exercise of a statutory discretion of a direction contained in a different part of the Act or in a different statute. The generality of the application of statutory provisions differs according to the precise phraseology of the provision and its statutory context. For example, the duty placed upon local authorities by sections 1 and 1A of the Children Act 1958 applies only to foster children²²

21 Paras. 5.35 and 5.36.

22 As defined in s.2(1) of the Children Act 1958.

within their areas. Similarly only protected children within the meaning of Part IV of the Adoption Act 1958²³ are entitled to the benefit of the duty placed upon local authorities by section 38 of that Act. Again, the duty cast upon the court by section 7(1)(b) of the Adoption Act 1958²⁴ to be satisfied that an adoption order "will be for the welfare of the infant" applied only where application was made for an adoption order. Finally, section 8(1)(a) of the Matrimonial Proceedings (Children) Act 1958 disables a court from granting certain consistorial decrees unless certain arrangements have been made for the welfare of the affected children. There are other examples but the pattern is clear. Even where the concept of welfare is expressed in general and broad terms, the specific application of the rule is restricted in terms of the provision itself. The context of the rule does likewise and thus reinforces this restriction.

5.41 Not all the provisions concerning welfare are so precise in their application. The reason may be that they appear to form part of an administrative code setting out broadly the policy to be followed in the exercise of the various functions. This relates these provisions clearly to the earlier paragraphs of this section of this chapter. The first group of such provisions applies to local authorities. Before their amendment in 1975²⁵ section 12(1)

23 Or Part III of the Adoption Act 1976.

24 Before its repeal.

25 Children Act 1975, ss.59 and 79.

of the Children Act 1948 and section 20(1) of the Social Work (Scotland) Act 1968 each required the local authority "to exercise their powers with respect to him [a child in their care] so as to further his best interests." The statutory duty is now to "give first consideration to the need to safeguard and promote the welfare of the child throughout his childhood". This is more precise than the earlier enactment. Both clearly operate to restrict the exercise of the local authority's powers.

5.42 The application of these provisions is rather complex. The Scottish provision refers to "a child in the care of a local authority under any enactment." The English provision, more specifically, refers in section 11 of the 1948 Act to a child in the care of a local authority "under section 1 of this Act or by virtue of a care order within the meaning of the Children and Young Persons Act 1969 or a warrant under section 23(1) of that Act." The English provision also applies to children in the care of a local authority by virtue of section 3(2) (a) of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, section 43 of the Matrimonial Causes Act 1973 and section 7(2) of the Family Law Reform Act 1969. The simplicity of the Scottish drafting compares favourably with the complexity of the English phraseology. This administrative direction thus applies in several contexts not apparent from the principal section or even the principal Act. Its importance in the law of children is fundamental. It is the basis for the approach to be adopted by any local authority to a child in their care.

5.43 Section 1(1) of the Children and Young Persons Act 1963 and section 12(1) of the Social Work (Scotland) Act 1968 are part of the administrative code applying to children. The 1963 Act provision imposes a duty upon every local authority "to make available such advice, guidance and assistance as may promote the welfare of children by diminishing the need to receive children into or keep them in care or to bring [them] before a juvenile court." The Scottish provision extends beyond children and the duty is "to promote social welfare by making available advice, guidance and assistance on such a scale as may be appropriate for their [local authority] area, and in that behalf to make arrangements and to provide or secure the provision of such facilities (including the provision or arranging for the provision of residential and other establishments) as they may consider suitable and adequate." The Scottish provision probably more positively sets out the fundamental policy inherent in the provision. These duties are general and not necessarily related to one statutory context. In that sense they probably pervade all the discretionary powers conferred by this legislation, although in an oblique and complex manner.

5.44 Whatever their juridical status, children's hearings have a fundamental role to fulfil under the Social Work (Scotland) Act 1968. That Act invests children's hearings with various powers²⁶ but the structure

26 See Part III.

of the legislation is such that the aim of these hearings lacks emphasis. Section 43(1) directs a children's hearing, after they have considered certain facts, grounds and information, to "proceed in accordance with the subsequent provisions of this section to consider on what course they should decide in the best interests of the child." The action which a hearing should take is clearly what is in the best interests of the child. The oblique reference to this objective in the legislation does not disguise its importance. Children's hearings are neither courts nor local authorities; they make fundamental decisions about children referred to them; and it would be consistent with the philosophy justifying their existence that the child's interests represent their sole concern.

5.45 If, despite its apparent formal context, section 43(1) of the 1968 Act is as important as suggested, it contrasts quite remarkably with section 49(1) of the Children and Young Persons (Scotland) Act 1937 and its English counterpart, section 44(1) of the Children and Young Persons Act 1933. These provisions direct "every court in dealing with a child or young person who is brought before it, either as an offender or otherwise,²⁷ to have regard to the welfare of the child or young person".

27 The words "or otherwise" were repealed for Scotland by the Social Work (Scotland) Act 1968, s.95(2) and Sched.9.

An additional duty is imposed to "take steps in a proper case for removing him from undesirable surroundings." Most of the functions of courts in Scotland with regard to children have been transferred to children's hearings and the policy of the 1968 Act is largely to remove children from contact with the criminal law and the criminal authorities. A court may nevertheless exercise a residual jurisdiction over children for an offence under section 31(1) of the 1968 Act. To that very limited extent section 49(1) of the 1937 Act may operate in practice.

5.46 The comparison between the approach to welfare in section 43(1) of the 1968 Act and section 49(1) of the 1937 Act and its English equivalent is understandable in the context of the different functions of children's hearings and courts. A children's hearing is not concerned with deciding whether the conditions justifying compulsory measures of care have been established.²⁸ A hearing decides only what measures are appropriate for the child after the need for compulsory measures has been established.²⁹ A court decides both matters.³⁰ It is unlikely however that welfare is relevant when the court is determining whether an offence has been committed or care proceedings are otherwise justified.³¹ On the other

28 Social Work (Scotland) Act 1968, s.42(2)(c).

29 Ibid., s.43.

30 Children and Young Persons Act 1969, Part I.

31 At least in Scotland.

hand the English requirements for care proceedings include establishing "need of care or control which he is unlikely to receive unless the court makes an order."³² Welfare may well be a factor to which the court should relevantly have regard in determining that question. That does not entirely justify the retention of section 49(1) of the 1937 Act for Scotland as "need of care or control" is not a requirement for compulsory measures of care. In any event, whatever their difficulties, section 43(1) of the 1968 Act, section 44(1) of the 1933 Act and section 49(1) of the 1937 Act are relevant broadly in their application to the various powers conferred by the legislation.

5.47 The final provision in this context is the creation of the paramountcy of welfare principle. Parliament has directed that "where any proceedings before any court the custody or upbringing of an infant ... is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration."³³ It is a wide but not unrestricted provision. It applies to "any proceeding" in "any court". It cannot therefore apply to local authorities, central government or children's hearings. It relates to any question concerning the custody or upbringing of an infant. It thus applies to a claim for custody in non-custodial proceedings; for example, matrimonial or consistorial cases. "Custody" is not defined. This matters little, since it is normally possible to decide

32 Children and Young Persons Act 1969, s.1(2)

33 Guardianship of Infants Act 1925, s.1;
Guardianship of Minors Act 1971, s.1

whether custody is in issue without the benefit of a precise definition. "Upbringing" is a more elastic concept and could cover almost all aspects affecting a child. Finally the court must "regard" welfare as paramount in deciding that question. The problems thrown up by these few words are immense and will be considered later. In summary, therefore, the paramountcy of welfare principle applies when any court is deciding any question concerning a child. That would appear to be the meaning of the provision. Whether it accords with the views expressed by the courts is another matter. In any event, that principle founded upon those provisions pervades the law affecting children applied by the courts.

5.48 This section of this chapter has so far dealt with increasingly general restrictions upon the exercise of a statutory discretion. One very specific point should be noted for the sake of completeness. Some of the powers set out in Table 5 are little more than formal, although they are no doubt necessary in a technical sense. Such powers tend to be procedural. Many of the powers are more substantial and have direct bearing upon the future of the child. Most of them are administrative in character. It is a feature of administrative powers that the status quo may be infinitely variable in the light of changing circumstances. Often a power to vary the existing regime is directly conceded. For example, section 15(1) of the Children and Young Persons Act 1969 enables the court to vary or discharge a supervision order.

Section 90(3) of the Social Work (Scotland) Act 1968 more broadly provides for the variation or revocation of any order made under the Act. The last example requires the power to vary or revoke to be exercised "in the like manner and subject to the same conditions" as the original order. This is true of any power to vary, modify or revoke by virtue of section 32(3) of the Interpretation Act 1889.³⁴ Thus an unrestricted discretion may be subject to the fulfilment of certain requirements not apparent on the face of the provision conferring the power.

5.49 Such powers, largely formal in character, are different from powers of review. Section 48 of the Social Work (Scotland) Act 1968 enables a supervision requirement made by a children's hearing under section 44 of that Act to be subject to review.³⁵ In particular section 48(3) provides that a supervision requirement shall cease to have effect if it has not been reviewed within a period of one year. These powers of review are fundamental to the functions of children's hearings. They relate more directly to the substance of the statutory discretion in comparison with those referred to in the preceding paragraph. The significant provision in this context requires that the restrictions governing the making of a supervision requirement apply also to a review of a supervision requirement.³⁶ In this case the advantage is that the requirement is explicit in the legislation.

34 52 & 53 Vict., c.63.

35 Supervision and care orders in England are variable in terms of the Children and Young Persons Act 1969, ss. 15 and 21.

36 Social Work (Scotland) Act 1968, s.48(6).

CHAPTER 6THE SUBSTANCE OF WELFARESection 1 - Introduction

6.1 The preceding chapters have been concerned to classify and explain the role of welfare in legislation as it has evolved in a largely functional context. This chapter cuts across that approach. The existence of various statutory approaches has been noticed and it will be helpful to consider now the substance of welfare rather than its function. A glance at the examples in Table 1 in Chapter 3 shows how diversified are the types of welfare regulated by statute. Most instances cover what may be described as material or physical welfare; for example, physical integrity, health, medical and dental care, accommodation, environment, hygiene, food, sanitation. Others relate to the moral well-being of the child; for instance, sexual integrity, betting, gaming, indulgence in or access to alcohol. Such specification may not always be possible. Emotional and psychological welfare are not referred to in terms in any statute but in view of the flexibility inherent in the word "welfare" such aspects may be within Parliamentary contemplation. These various aspects of the substance of welfare are quite obvious and need no further elaboration in this context.

6.2 There are however several other aspects of welfare which recur frequently throughout the legislation. They deserve individual classification. They have as direct and obvious a bearing upon the child and his welfare as the instances in the preceding paragraph. The interests of a child may be protected indirectly by creating the appropriate decision-making context. This is an important aspect of welfare in the broadest sense and it appears to be attracting increasing official attention. It may be called the procedural protection of a child and it operates in an administrative or judicial context. Rules have been devised to ensure to a limited extent that the interests of the child are neither neglected nor overridden in the course of official proceedings.

6.3 This chapter also considers two other individually significant aspects of welfare; religion and education. Finally, note should be taken of rules governing the position of others. Legislation regarding children normally seeks to safeguard their welfare and interests but it may be that their welfare can be protected by conferring rights upon or safeguarding the interests of other persons, notably parents. Such protection may be intended to protect such other persons themselves in addition to or in place of any protection afforded obliquely thereby to the child. As a postscript this chapter, largely for the sake of completeness, looks at the statutory powers enabling subordinate legislation affecting children to be enacted.

Section 2 - Procedural safeguards

6.4 The interests of children may be protected not only by making them the centre piece of the decision-making process, but also by creating appropriate procedures which indirectly but nevertheless clearly help to achieve the same overall objective. Table 6 exemplifies statutory procedures relating largely to judicial proceedings which are designed to protect the interests, including the emotional stability, of the child. These provisions are direct and objectively ascertainable in the same way as those in Table 1. They do not refer to the welfare or interests of the child as such but it takes little imagination to conclude that the safeguarding of such interests is the objective of the legislation. Table 6 may thus be said to be the procedural counterpart of the substantive provisions classified in Table 1.

TABLE 6

PROCEDURES PROTECTING THE INTERESTS OF CHILDREN

Part 1 - Provision of Acts of Parliament

<u>Section</u>	<u>Provision</u>
<u>Children and Young Persons Act 1933 (23 & 24 Geo.5, c.12):Eng.</u>	
<u>Children and Young Persons (Scotland) Act 1937 (1 Edw. 8 & 1 Geo.6, c.37): Scot.</u>	
1933 s.31	Separation of children and young persons
1937 s.39	from adults in police stations, courts, etc.

<u>Section</u>	<u>Provision</u>
1933 s.36 1937 s.44	Prohibition against children being present in court during trial of other persons.
1933 s.37(1) 1937 s.45(1)	Clearance of court while child or young person is giving evidence in cases involving questions of decency or morality.
1933 s.39(1) 1937 s.46(1)	Concealment of identity of child involved in judicial proceedings.
1933 s.43	Admission of deposition of child or young person in evidence in certain circumstances.
1933 s.47(2) 1937 s.52(1)	Procedure in juvenile courts: court not to sit in room where a non-juvenile court has or will convene within an hour; restriction on who may be present.
1933 s.49(1) 1937 s.54(1)	Restriction on newspaper reports of proceedings in juvenile courts.
<u>Criminal Justice Act 1948 (11 & 12 Geo. 6, c.58) : Eng.</u>	
<u>Criminal Justice (Scotland) Act 1949 (12, 13 & 14 Geo.6, c.94) : Scot.</u>	
1948 s.17(2) 1949 s.18(2)	Court to obtain and consider information about character and physical and mental condition of person under 21 for purpose of determining whether a method other than imprisonment is appropriate.

Magistrates' Courts Act 1952 (15 & 16 Geo.6 & 1 Eliz.2, c.55): Eng.

- 1952 s.57(1) Hearing and determination of domestic proceedings to be separated from other business of the courts.
- 1952 s.57(2) Restriction on persons who may be present during domestic proceedings.
- 1952 s.58(1) Restriction on newspaper reporting of domestic proceedings.

Children and Young Persons Act 1963 (1963 c.37) : G.B.

- 1963 s.27 Restriction on use of evidence of children in committal proceedings for sexual offences.

Social Work (Scotland) Act 1968 (1968 c.49) : Scot.

- 1968 s.3(1) Prohibition against prosecuting a child for any offence except on the instructions of the Lord Advocate or at his instance.
- 1968 s.34(3) Accommodation and facilities for children's hearings to be dissociated from criminal courts and police stations.
- 1968 s.35(1) Restrictions upon persons who may be present at a children's hearing.

SectionProvision

- 1968 s.40(2) Consideration of case by children's
hearing in the absence of the child.
- 1968 s.58(1) Restrictions upon the publication of
reports of proceedings in any children's
hearing.

Children and Young Persons Act 1969 (1969 c.54) : Eng.

- 1969 s.6 Persons under 17 to be tried summarily
except in special circumstances.
- 1969 s.8(1) Restrictions upon fingerprinting of
suspected young persons.

Children Act 1975 (1975 c.72) : G.B.Adoption Act 1976 (1976 c.36) : Eng.

- 1975 s.20 Appointment of curator (guardian) ad litem
1976 s.65 in adoption proceedings.
- 1975 s.21 Hearing of adoption application in
1976 s.64 camera.
- 1975 s.64: Eng. Representation of children in certain
1975 s.66: proceedings when there is a conflict of
Scot. interest between parent and child.

Part 2 - Provisions of Statutory InstrumentsRuleProvisionCounty Court Rules 1936 (S.R. & O. 1936 No.626) : Eng.

1936 r.1(1) Proceedings under the Guardianship Acts
to be heard and determined in Chambers
unless the court otherwise directs.

Rules of the Supreme Court 1965 : Eng.

1965 Ord. 90.7 Applications under Guardianship Acts
may be disposed of in Chambers.

Magistrates' Courts (Children and Young Persons) Rules1970 (S.I. 1970 No.1792) : Eng.

1970 r.6 Duty placed upon court to explain the
substance of the charge to the child or
young person in offence proceedings.

1970 r.8(2) Duty placed upon court to ask questions
on behalf of the child or young person where
the child or young person is not legally
represented in offence proceedings.

1970 r.10(1)(a) Opportunity of making a statement to the
juvenile court to be afforded to the child
or young person after a finding of guilty.

1970 r.10(1)(e) Power of court to require the child or
young person or parent or guardian to withdraw
from the court after a finding of guilty.

RuleProvision

- | | |
|---------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1970 r.10(2) | Right of the child or young person or parent or guardian to be told the substance of certain information given to the juvenile court in certain cases after a finding of guilty. |
| 1970 r.11(1) | Duty placed upon court to provide information of the proposed manner of the disposal of the case and to allow representations (in the case of juvenile offenders). |
| 1970 r.16(1) | Duty placed upon court to explain the nature of care proceedings and the grounds on which they are brought. |
| 1970 r.18(1) | Power of court in care proceedings to hear whole or part of evidence in the absence of the child or young person. |
| 1970 r.20(1)
(d) | Power of court to require the parent or guardian to withdraw from the court in care proceedings. |
| 1970 r.21(1) | Duty placed upon court to provide information of the proposed manner of the disposal of the case and to allow representations (in the case of care proceedings). |

RuleProvisionAct of Sederunt (Social Work) (Sheriff Court Procedure Rules) 1971 (S.I. 1971 No.92) : Scot.

- 1971 r.6(1) Service on child by reporter of a copy of the application and warrant.
- 1971 r.8(3) Power of sheriff to hear evidence in the absence of the child.
- 1971 r.15(2) Power of sheriff to adjourn the diet to enable further evidence to be produced as a result of information disclosed in the course of an appeal.

Children's Hearings (Scotland) Rules 1971 (S.I. 1971 No.492) : Scot.

- 1971 r.7(1) Duty placed upon the reporter to give to the child notification of the hearing.
- 1971 r.17(2)
(a) Duty placed upon the hearing to consider a report of the local authority on the child and his social background.
- 1971 r.17(2)
(c) Duty placed upon the hearing to discuss the case with the child.
- 1971 r.17(2)
(d) Duty placed upon the hearing to endeavour to obtain the views of the child.
- 1971 r.21 Duty placed upon the reporter to make available a report of the local authority on the child and his social background where the child is in interim detention.
-

6.5 There are essentially six different types of statutory provision in this Table. Some of the examples regulate the physical environment in which children and young persons are dealt with officially. Others prescribe who may attend the official hearings and in what circumstances a child or young person may be exempt from attendance. Confidentiality and restriction upon publicity are another feature of the examples in Table 6. Provision is made for the court itself to assist the conduct of the case on behalf of the child or young person. Finally, there are two examples of making the rules of evidence more flexible to assist in promoting the objectives of safeguarding the interests of the child and of positively advancing the child's welfare. The former objective may be achieved by rendering admissible the depositions of children and the latter by the judicial requisition of information on certain topics which will assist the court in deciding how best to deal with the child or young person.

6.6 There are thus several ways in which Parliament has amended the normal rules of procedure and evidence to enable the special position of children to be taken into account. Broadly they ensure that the sensibilities of young children will not be prejudiced by their participation in judicial proceedings and that the court will have as much relevant information as possible in coming to a decision on the treatment of the child. These aspects of

the legislation demonstrate the essentially administrative character of the examples in Table 6. The rules are designed not to resolve conflicts but to indicate lines of policy to enable the court to create a sensitive environment for dealing with children.

Section 3 - Education

6.7 Education is one of the most important aspects of the upbringing of a child. The law concerning education is now very much a matter of public interest. Table 7 contains several instances of the ways in which statute regulates the secular education of children. They are on the whole expressed in fairly general language. They confer and impose powers and duties upon parents, education authorities and other educational administrative bodies. The structure of the provisions is thus essentially administrative. It is not surprising that most of the provisions are analysed in functional terms.

TABLE 7

STATUTORY REGULATION OF EDUCATION

Part 1 - Provisions of Acts of Parliament

Section

Provision

Children and Young Persons Act 1933 (23 & 24 Geo.5, c.12):

Eng.

Children and Young Persons (Scotland) Act 1937 (1 Edw.8

& 1 Geo.6, c.37): Scot.

1933 s.10(1)	Offence for vagrants to prevent children
1937 s.21(1)	from receiving education.

SectionProvision

Education Act 1944 (7 & 8 Geo.6, c.31): Eng.

Education (Scotland) Act 1962 (10 & 11 Eliz.2, c.47):

Scot.

1944 s.8(1) Duty placed upon local education authority to provide sufficient schools for the individual needs of the pupils.

1962 s.1(1) Duty placed upon education authority to secure that adequate and efficient provision is made throughout their area of all forms of primary, secondary and further education.

1944 s.36 Duty placed upon parent to cause every
1962 s.31 child of school age to receive efficient and suitable education.

1944 s.76 Pupils to be educated in accordance with
1962 s.29(1) the wishes of their parents.

Children and Young Persons Act 1969 (1969 c.54): Eng.

1969 s.1(1) Lack of efficient full-time education
and (2)(e) suitable to his age, ability and aptitude as a ground for care proceedings.

Part 2 - Provisions of Statutory Instruments

Rule or regulation

Provision

Approved School Rules 1933 (S.R. & O. 1933 No.774): Eng.

- | | |
|--------------|------------------------------------------------------------------------------------------------|
| 1933 r.10(2) | Duty placed upon managers to ensure satisfactory education of the boys resident in the school. |
| 1933 r.26(1) | Education to be provided according to the principles of the Education Act 1944. |

Remand Home Rules 1939 (S.R. & O. 1939 No.12): Eng.

- | | |
|-----------|---------------------------------------------------------------------------------------------|
| 1939 r.10 | Provision of suitable schoolroom instruction or of practical work for boys over school age. |
|-----------|---------------------------------------------------------------------------------------------|

Approved Probation Hostel and Home Rules 1949 (S.I.1949 No.1376): Eng.

- | | |
|-------------|------------------------------------------------------------------------------|
| 1949 r.6(1) | Duty placed upon committee to ensure satisfactory training of the residents. |
| 1949 r.19 | Every hostel and home to be provided with an approved scheme of training. |

Borstal (Scotland) Rules 1950 (S.I. 1950 No.1944): Scot.

Borstal Rules 1964 (S.I. 1964 No.387): Eng.

- | | |
|--------------|---------------------------------------------------------------------------------------------|
| 1950 r.45(1) | Inmate to be instructed in occupations which may fit him to earn his livelihood on release. |
|--------------|---------------------------------------------------------------------------------------------|

<u>Rule or regulation</u>	<u>Provision</u>
1964 r.29(2)	Inmate's work to help to fit him to earn his living on release.
1964 r.29(3)	Provision for technical training of suitable inmates in skilled trades.
1950 r.54(1)	Provision of continued education of inmates
1964 r.30(1)	by class teaching, individual study and all such cultural influences.

Detention Centre Rules 1952 (S.I. 1952 No.1432): Eng.

Detention Centre (Scotland) Rules 1960 (S.I. 1960 No.870):
Scot.

1952 r.45(1)	Provision of full-time education for
1960 r.41(1)	inmates of compulsory school age.
1952 r.45(2)	Provision of part-time education for
1960 r.41(2)	inmates not of compulsory school age.

Children (Performances) Regulations 1968 (S.I. 1968
No.1728): G.B.

1968 r.10	Duty placed upon licensing authority not to grant a licence unless child's education will not suffer and arrangements for the child's education have been approved.
-----------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------

6.8 The scheme revealed by Table 7 involves four elements. The principle around which the system revolves is the duty placed upon the parent to cause every child of school age to receive efficient and suitable education. The parent is given a certain discretion in deciding how to fulfil this duty but the foundation of the administrative structure is the statutory duty placed upon the local education authority to provide sufficient schools for the individual needs of the pupils. It is open to a parent to delegate his statutory duty to educate; most parents implement their duty in this way. Parental wishes are relevant to the way in which their children are to be educated.

6.9 The legislation leaves largely unregulated the method by which these objectives may be achieved. This is no doubt deliberate policy. Parliament has confided to the local education authorities the means of securing the detailed implementation of their statutory duties. There are however two important restrictive factors. Firstly the combined effect of sections 8(1) and 36 of the Education Act 1944 requires the individual educational needs of each child to be secured. The duty is thus general, but it is specific in relation to each individual child. Secondly, section 76 of the 1944 Act requires the administrative authority to have regard in exercising their functions to the general principle that "so far as is compatible with the provision of efficient instruction and training and the avoidance of unreasonable

public expenditure, pupils are to be educated in accordance with the wishes of their parents." The wishes of parents are thus relevant. But it is difficult to assess how significant in practice they are, as they are considerably restricted by these inhibitory qualifications. The two statutory criteria described in this paragraph are the only instances of legislative assistance to administrative bodies in implementing their duties.

6.10 The third element to note concerns the legal effect of failure to educate a child in terms of the Act. Parental failure to secure the education of a child under section 36 of the 1944 Act attracts the sanction of a school attendance order. This is essentially an administrative sanction but ultimately failure to comply constitutes a criminal offence. The local education authority scheme of education is supported by a parental duty to secure regular attendance; failure is an offence against section 39 of the 1944 Act. Somewhat differently, the lack of proper educational arrangements for a child is a bar to the granting of a license authorising a child to take part in a performance to which section 37 of the Children and Young Persons Act 1963 applies. A further, and potentially powerful, weapon available to support the educational duty is to be found in section 1(1) and (2)(e) of the Children and Young Persons Act 1969. Lack of efficient full-time education suitable to his age, ability and aptitude coupled with need of care or control renders a child or young person liable to be brought before a

juvenile court in care proceedings. This language reflects that used in section 36 of the Education Act 1944 which creates the parental duty to secure the education of their children. Section 1 of the 1969 Act operates, therefore, as a further method of enforcing the parental duty to secure education.

6.11 The last point to draw attention to is the nature of the provisions in Part 2 of Table 7, namely those contained in statutory instruments. Apart from regulation 10 of the Children (Performances) Regulations 1968, all the examples in Part 2 merely prescribe the educational function to be exercised in various institutional establishments. Obviously an educational regime is considered to be an important and integral part of the training in such establishments. The requirements are expressed in general functional terms; much is thus left to the administrative imagination of the staff of these establishments and the requirements of the general law, already discussed, insofar as they apply to the young persons in question.

6.12 The instances in Table 7 demonstrate a point already anticipated. Education is merely one aspect of welfare. The analysis implicit in Table 7 sets out the scheme of the Act in relation to one unit of welfare. It also shows by reference to the preceding Tables how varied and complex and yet interdependent are the ways in which education as one unit of welfare has been handled by Parliament. Most of the examples in Table 7 have

been treated as administrative. It is consistent with earlier analysis that they are also functional in the sense that the legislation specifies what is intended rather than how it should be implemented.

Section 4 - Religion

6.13 At one time religion and religious education were much more closely regulated by the legal system than secular education. Religious education, to some extent now built into the system of public education, has become less important. But the law nevertheless provides for it in some detail. The pattern of legal regulation of religious education has changed over the years. The present approach of the legal system may be discerned from an examination of Table 8.

TABLE 8

STATUTORY REGULATION OF RELIGION

Part 1 - Provisions of Acts of Parliament

<u>Section</u>	<u>Provision</u>
<u>Custody of Children Act 1891 (54 & 55 Vict., c.3): G.B.</u>	
1891 s.4	Power of court to make an order to secure that a child shall be brought up in the religion in which the parent has a legal right to require that the child should be brought up where the parental right to custody is not enforced by the court.

SectionProvision

Education Act 1944 (7 & 8 Geo.6, c.31): Eng.

1944 s.39(2) Absence of a child from school on any day exclusively set apart for religious observance by the religious body to which his parent belongs not to amount to failure to attend regularly.

Children Act 1948 (11 & 12 Geo.6, c.43): Eng.

Social Work (Scotland) Act 1968 (1968 c.49): Scot.

1948 s.1(3)(b) Relatives or friends of a child received
1968 s.15(3) into care may take over the care of the
(b) child and preference to be given to persons of the same religious persuasion as the child.

1948 s.3(7) Inability of local authority to cause child
1969 s.17(7) to be brought up in any religious creed other than that in which he would have been brought up but for a resolution by the local authority assuming parental rights of the child.

1948 s.18(1) Local authority not to cause body of child
1968 s.28(1) in care to be cremated where not in accordance with the practice of the child's religious persuasion.

SectionProvisionSocial Work (Scotland) Act 1968 (1968 c.49): Scot.

1968 s.44(2) Children's hearing to have regard to the religious persuasion of a child in making a supervision requirement requiring the child to reside in a residential establishment.

Children and Young Persons Act 1969 (1969 c.54): Eng.

1969 s.24(3) Person in the care of a local authority not to be caused to be brought up in any religious creed other than that in which he would have been brought up apart from the care order.

Children Act 1975 (1975 c.72): Scot.Adoption Act 1976 (1976 c.36): Eng.

1975 s.13 Duty placed upon adoption agency to
1976 s.7 have regard (so far as is practicable) to any wishes of the parent and guardian as to the religious upbringing of the child.

Part 2 - Provisions of Statutory InstrumentsRule or regulationProvisionApproved School Rules 1933 (S.R. & O. 1933 No.774): Eng.

1933 r.29 Provision for daily worship; religious instruction suitable to age and capacity; preference for religious instruction in religious persuasion to which child belongs.

SectionProvisionRemand Home Rules 1939 (S.R. & O. 1939 No.12): Eng.

1939 r.12 Provision for Sunday worship; provision
for visits by minister of religious
persuasions to which the child belongs.

Approved Probation Hostel and Home Rules 1949 (S.I. 1949
No.1376): Eng.

1949 r.22 Provision of facilities for the practice
of religion and for Sunday worship
according to individual religion.

Borstal (Scotland) Rules 1950 (S.I. 1950 No.1944): Scot.Borstal Rules 1964 (S.I. 1964 No.387): Eng.

1950 r.47 Determination of religious denomination
1964 r.12 of inmate.

1950 r.51 Duty placed upon chaplain to visit inmates
1964 r.13 in prescribed circumstances.

1950 r.49 Provision of religious services
1964 r.15

1950 r.50 Availability and provision of religious
1964 r.18 books.

Administration of Children's Homes Regulations 1951 (S.I.
1951 No.1217): Eng.

SectionProvisionAdministration of Children's Homes (Scotland) Regulations1959 (S.I. 1959 No.834): Scot.

1951 r.4	Duty placed upon administering authority
1959 r.5	to secure that the child receives religious instruction appropriate to the religious persuasion to which he belongs.

Detention Centre Rules 1952 (S.I. 1952 No.1432): Eng.Detention Centre (Scotland) Rules 1960 (S.I. 1960 No.870): Scot.

1952 r.48	Ascertainment and recording of religious denomination of every inmate.
1960 r.44	
1952 r.49	Facilities for visits by ministers of religion to which inmate belongs (if not Church of England in England).
1960 r.45	
1952 r.50(1)	Provision for periodical religious worship or instruction.
1960 r.46(1)	
1952 r.52	Provision of books of religious observance and instruction recognised for the inmate's denomination.
1960 r.47	
1952 r.114	Change in religious denomination to be conscientious.
1960 r.111	

SectionProvision

Boarding-out of Children Regulations 1955 (S.I. 1955
No.1377): Eng.

Boarding-out of Children (Scotland) Regulations 1959
(S.I. 1959 No.835): Scot.

1955 r.11(2)	Registration of particulars of children
1959 r.17(4) (a) and (b)	boarded-out, including religious persuasion of child and of foster-parents.
1955 r.17(1) (b)(i)	Duty to obtain information on the religious persuasion of foster-parents.
1955 r.17(2)	Notification of the religious persuasion
1959 r.11(3) (a) and (b)	of a foster child for certain purposes.
1955 r.19	Preference for a child to be boarded-out
1959 r.4	with foster-parents of the same religious persuasion as the child or who give an undertaking to that effect.
1955 r.27	Undertaking by foster parents of a child boarded-out for a short term relating to the religious persuasion of the child.

6.14 A breakdown of the contents of Table 8 disclose three types of statutory provision. Most of the provisions in Part 2, namely statutory instruments, are administrative in character. They relate largely to the provision of

facilities for religious observance and instruction in institutional establishments, supported by the administrative information-gathering processes.

6.15 So far as the substantive provisions are concerned, the basic question is how effect may be given to the religion in which the child is to be brought up. The statutory rules do not offer any assistance in determining which religion is appropriate for the child in question. It is nevertheless significant that reference is made in some form or another to the religion of the child, not to the religion of the parent. The two are not necessarily the same. The only exceptions are to be found in section 4 of the Custody of Children Act 1891 and section 39(2) of the Education Act 1944. They refer respectively to the religion in which the parent has a legal right to require that the child should be brought up and to the religious body to which the child's parent belongs. Exceptionally therefore the objective is to protect or enforce the parent's interest in the child's religion; the more normal provision enforces the child's own interest in his religious education.

6.16 These interests are enforced and protected in different ways. The statutory provisions may directly and objectively state that in the prescribed circumstances the child shall be brought up in the religion to which he belongs; for example, where the child is in the care

of a local authority. In a similar direct manner before 1975 power was given to a person whose consent was required for an adoption order to attach conditions with regard to the religion of the child. This has been superseded by the duty placed upon adoption agencies to have regard at the placement stage to any wishes of the child's parents and guardians. The first example is the duty placed upon the authority administering a children's home to secure that the child receives religious instruction appropriate to the religious persuasion to which he belongs.

6.17 The other statutory approach does not prescribe objective rules; it merely provides a statutory preference. For example, section 1(3)(b) of the Children Act 1948 places upon a local authority a duty to endeavour to secure that the care of the child should be taken over inter alia by a relative or friend of his, "being where possible, a person of the same religious persuasion as the child." The contents of this duty, albeit mandatory in itself, are more in the nature of a statutory exhortation. The weakness of the provision is in the "possibility" of giving preference to the child's religious persuasion. The other two examples of the preferential approach are to be found in rule 29 of the Approved School Rules 1933 and regulation 19 of the Boarding-out of Children Regulations 1955, both of which are drafted in terms similar to those of section 1(3)(b) of the 1948 Act. They are self-analytical and no further explanation is necessary.

Section 5 - Protection of interests other than those
of children

6.18 These rules on religion are a compromise between the interests of the parent and of the child. It is indeed axiomatic that to some extent the law of children creates a delicate balance between the interests of the child and those of the other persons, particularly the child's parents. It is probably a matter of debate whether the conferment of rights upon parents and other persons is intended to benefit the recipient of the right or the child, although in the latter case the benefit for the child would be only obliquely identifiable. Table 9 contains examples of such provisions.

TABLE 9

PROVISIONS PROTECTING THOSE OTHER THAN CHILDREN

Part 1 - Provisions of Acts of Parliament

<u>Section</u>	<u>Provision</u>	<u>Other Person</u>
<u>Children and Young Persons Act 1933 (23 & 24 Geo.5, c.12): Eng.</u>		
<u>Children and Young Persons (Scotland) Act 1937 (1 Edw.8 & 1 Geo. 6, c.37): Scot.</u>		
1933 s.1(7)	Punishment of a child or	Parent, teacher
1937 s.12(7)	young person.	or other person having lawful control or charge.

<u>Section</u>	<u>Provision</u>	<u>Other Person</u>
1933 s.34(1)	Attendance at court of	Parent or guardian
1937 s.42(1)	certain persons when a child or young person is brought before the court.	

Education Act 1944 (7 & 8 Geo.6, c.31): Eng.

1944 s.37(3)	Duty placed on local education authority to give notice of intention to apply to the minister for a direction determining what school is to be named in an attendance order.	Parent
1944 s.38(3)	Duty placed on the minister not to make a direction determining what special school is to be named in a school attendance order unless the parent consents or there is a certificate of disability.	Parent

Guardianship (Refugee Children) Act 1944 (7 & 8 Geo.6,
c.8): G.B.

1944 s.1(2): Eng.	Power of Secretary of State to give notice of an appointment of a ward (tutor in Scotland) to	Parent
----------------------	--------------------------------------------------------------------------------------------------------	--------

<u>Section</u>	<u>Provision</u>	<u>Other Person</u>
1944 s.2(2): Scot.	any parent whose name and address are known.	
<u>Children Act 1948 (11 & 12 Geo.6, c.43):Eng.</u>		
<u>Social Work (Scotland) Act 1968 (1968 c.49): Scot.</u>		
1948 s.1(3)	Restriction on power of	Parent, guardian,
1968 s.15(3)	local authority to keep in care a child already received into care.	relative or friend.
1948 s.2(2)	Duty placed on local	Parent or guardian.
1968 s.16(2)	authority after resolution assuming parental rights to serve notice on person on whose account the resolution was passed.	
1948 s.12(1A)	Modification of the general duty placed upon the local authority in child care cases.	Members of the public.
1948 s.17(2)	Restriction on Secretary	Parent or guardian.
1968 s.23(2)	of State consenting to the emigration of a child in the care of a local authority.	

<u>Section</u>	<u>Provision</u>	<u>Other Person</u>
<u>Social Work (Scotland) Act 1968 (1968 c.49): Scot.</u>		
1968 s.41(1)	Right to attend at all stages of a children's hearing.	Parent.
1968 s.44(6)	Power of director of social work to transfer a child to another place of residence.	Any other child in the place.
<u>Children and Young Persons Act 1969 (1969 c.54):Eng.</u>		
1969 s.2(9)	Power of court in relation to an infant not before the court and under the age of 5 in respect of whom it is proposed to bring care proceedings, after affording opportunity to be heard to certain persons.	Parent or guardian.
1969 s.18(3)	Duty placed on court to send a copy of a supervision order or an order varying or discharging a supervision order to certain persons.	Supervised person, parents or guardian, supervisor.

<u>Section</u>	<u>Provision</u>	<u>Other Person</u>
1969 s.28(3)	Duty placed on person detaining a child or young person in a place of safety to take steps to inform certain persons.	Parent or guardian.
1969 s.28(4)(b)	Duty placed on constable detaining a child or young person in a place of safety to take steps to inform certain persons.	Parent or guardian.
<u>Guardianship of Minors Act 1971 (1971 c.3):Eng.</u>		
<u>Guardianship of Infants Act 1886 (49 & 50 Vict., c.27):</u>		
<u>Scot.</u>		
<u>Guardianship of Infants Act 1925 (15 & 16 Geo.5, c.45):</u>		
<u>Scot.</u>		
1971 s.9(1)	Application for custody	Mother and father.
1886 s.5	and access.	
<u>Guardianship Act 1973 (1973 c.29): G.B.</u>		
1973 s.1(1): Eng.	Equality of parental	Mother and father.
1973 s.10(1): Scot.	rights.	
<u>Children Act 1975 (1975 c.72): Scot.</u>		
<u>Adoption Act 1976 (1976 c.36): Eng.</u>		
1975 s.12(1) (b)(i)	Agreement required to	Parent or guardian.
1976 s.16(1) (b)(i)	enable adoption order to be made.	

Part 2 - Provisions of Statutory Instruments

<u>Rule</u>	<u>Provision</u>	<u>Other Person</u>
<u>Remand Home Rules 1939 (S.R. & O. 1939 No.12): Eng.</u>		
1939 r.19	Consent required to operative treatment on a boy.	Parent or guardian,
<u>Borstal (Scotland) Rules 1950 (S.I. 1950 No.1944): Scot.</u>		
<u>Borstal Rules 1964 (S.I. 1964 No.387): Eng.</u>		
1950 r.38(3)	Power to put an inmate	Other inmates.
1964 r.45(1)	under restraint (mechanical restraint in Scotland) to prevent injury.	
1964 r.35(2)	Power to allow inmate an additional letter or visit where necessary for welfare of his family.	His family.
<u>Magistrates' Courts (Children and Young Persons) Rules</u>		
<u>1970 (S.I. No.1792): Eng.</u>		
1970 r.5(1)	Assistance for a child or young person in conducting his defence in juvenile proceedings (offences).	Parent, guardian relative or other responsible person.

<u>Section</u>	<u>Provision</u>	<u>Other Person</u>
1970 r.10(1) (a)	Opportunity of making a statement to the juvenile court when a child or young person is found guilty of an offence.	Parent or guardian
1970 r.11(1)	Duty placed upon the court to provide information of the proposed manner of the disposal of the case and to allow representations (juvenile offenders)	Parent or guardian
1970 r.14(2) and (3)	Notification of care proceedings to various persons.	Parent or guardian
1970 r.17(1)	Duty placed upon the court to allow the case to be conducted on behalf of the child or young person by certain persons (care proceedings).	Parent or guardian

<u>Section</u>	<u>Provision</u>	<u>Other Person</u>
1970 r.21(1)	Duty placed upon the court to provide information of the proposed manner of the disposal of the case and to allow representations (care proceedings).	Parent or guardian

Act of Sederunt (Social Work) (Sheriff Court Procedure Rules)

1971 (S.I.1971 No.92): Scot.

1971 r.6(2)	Duty placed upon reporter to intimate hearing of an application to any parent whose whereabouts are known to him.	Parent
-------------	-------------------------------------------------------------------------------------------------------------------	--------

1971(r.8(4)	Duty placed upon sheriff to inform the parent of the substance of any allegation made by the child where the parent is excluded while the child is giving evidence.	Parent
-------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------

Children's Hearings (Scotland) Rules 1971 (S.I. 1971

No.492): Scot.

1971 r.8(1)	Duty placed upon reporter to give notification of the hearing to the parent of a child whose case is	Parent
-------------	------------------------------------------------------------------------------------------------------	--------

<u>Section</u>	<u>Provision</u>	<u>Other Person</u>
----------------	------------------	---------------------

to be considered at a
children's hearing.

1971r.17(2) (c)	Duty placed upon child- ren's hearing to discuss the case with the parent if attending the hearing.	Parent
--------------------	--------------------------------------------------------------------------------------------------------------	--------

1971r.17(2) (d)	Duty placed upon child- ren's hearing to endeavour to obtain the view of the parent if attending the hearing.	Parent
--------------------	---------------------------------------------------------------------------------------------------------------------------	--------

Reporter's Duties and Transmission of Information etc. (Scotland)
Rules 1971. (S.I. 1971 No. 525): Scot.

1971r.4(2) (b)	Duty placed upon the reporter to give notification to the parent of a child where he authorises liberation of the child.	Parent
-------------------	--------------------------------------------------------------------------------------------------------------------------------------	--------

1971r.6(2) (b)	Duty placed upon the reporter to send a copy of a super- vision requirement to any person responsible for the child (not being the local authority).	Person responsible
-------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------

6.19 Most of the examples in Table 9 probably benefit
the parent by complementing parental common law rights,
while the others may no doubt be justified as beneficial

to the child on the ground that, for example, parental care is prima facie preferable to institutional or similar upbringing. For instance section 1(3) of the Children Act 1948 restricts in favour of a parent or guardian the power of the local authority to keep a child in their care. Similarly the power to punish a child reserved to a parent, teacher or other person with lawful control or charge of the child by section 1(7) of the Children and Young Person Act 1933 may be justified by reference to the possible beneficial aspects of punishment of a child.

6.20 These examples, whether they relate either obliquely or otherwise to the advantage of the child, operate neither administratively nor procedurally but substantively. There are several examples in Table 9 of the conferment of substantive rights, the beneficiary of which is manifestly not the child. A particularly clear instance is the modification by section 27(2) of the Children and Young Persons Act 1969 of the duty placed by section 12(1) of the Children Act 1948¹ upon local authorities to give first consideration to the need to safeguard and promote the welfare of children in their care. The duty is elided where to do so would be "necessary for the purpose of protecting members of the public."

1 As substituted by the Children Act 1975, s.59.

6.21 Parliament has conferred substantive rights upon parents and others less spectacularly. For example, section (1) of the Guardianship Act 1973 equalises parental rights as between mother and father. Section 12(1) of the Children Act 1975 makes parental agreement a condition for the granting of an adoption order. In a different context, rule 38(3) of the Borstal (Scotland) Rules 1950 authorises an inmate to be placed under mechanical restraint to prevent injury to other inmates. Although it would be difficult to argue that the child receives any benefit or advantage from these provisions, it must be recalled that the refusal of parental agreement to adoption is subject to the judicial power to dispense with such agreement in certain prescribed circumstances to which the welfare and interests of the child are relevant.

6.22 Most of the examples in Table 9 simply confer procedural rights upon parents and others. The instances from the Magistrates' Courts (Children and Young Persons) Rules 1970, the Act of Sederunt (Social Work) (Sheriff Court Procedure Rules) 1971, the Children's Hearings (Scotland) Rules 1971 and the Reporter's Duties and Transmission of Information etc. (Scotland) Rules 1971 deal with procedures applicable in juvenile courts and children's hearings. In almost all the examples the parent of the child is the beneficiary of the provision. Occasionally the child also receives an advantage from the

rule; for example, rules 5(1) and 17(1) of the Magistrates' Court (Children and Young Persons) Rules 1970 deal with the conduct of the case on behalf of the child. Statute also confers procedural rights upon parents; for example, section 41(1) of the Social Work (Scotland) Act 1968, section 2(9) of the Children and Young Persons Act 1969 and section 34(1) of the Children and Young Persons Act 1933. These various procedures are quite straightforward and need no further analysis.

6.23 These examples highlight the conflict of interest between parent and child without doing anything to resolve the conflict. This is a fundamental problem not only of procedure but also of substance. In 1975 Parliament made an attempt to solve these problems by disabling a parent from representing his child in care and similar proceedings in England and under the Social Work (Scotland) Act 1968 in Scotland.² In effect where it appears to the court or the chairman of a children's hearing that there is such a conflict of interest, a person to represent the child shall be appointed "unless to do so is not necessary for safeguarding the interests of the child." Independent representation of a child in this way is a new concept which does much to recognise that in practice substantial interests are unlikely to be effectively protected without adequate procedural safeguards.

2 Children Act 1975, ss.64 and 66.

6.24 The other method of protection revealed by Table 9 is functional in character. Some of the functions are simply administrative; for example, sending copies, giving notice, providing information. Others attract a greater degree of substance. One way is to require the parent to be consulted before an administrative decision is made, as in section 17(2) of the Children Act 1948 where the Secretary of State is considering whether emigration would benefit the child. A stronger requirement is the obtaining of parental consent or agreement; for example, before an adoption order may be made, before a child may be ordered to attend a special school or before a boy in a remand home may be forced to undergo operative treatment. Finally the substance of the provision may be the subject matter for a discretion. Section 9(1) of the Guardianship of Minors Act 1971 enables the court to make an order for custody or access in favour of either parent; section 44(6) of the Social Work (Scotland) Act 1968 authorises a director of social work to alter the place of residence of a child laid down as a condition of a supervision requirement but only "in any case of urgent necessity in the interests of the child or of the other children" in that place of residence; and rule 35(2) of the Borstal Rules 1964 allows an inmate to receive an additional letter or visit where it is necessary for the welfare of the family. The beneficiaries of these three statutory discretions go well beyond the parents of the child to include the other residents in some establishment or institution and the child's family. It is perhaps

an open question who are included in that expression; it probably goes beyond the nuclear family of the inmate. Precision is probably unnecessary for the person exercising the discretion will also have a discretion to adopt an interpretation favourable to the child and even perhaps to the child's "family".

6.25 The examples in this Table thus demonstrate several different ways of protecting the interests of or conferring rights upon persons other than the child himself. They are mostly procedural; some are administrative; a few involve substantive rights. The diversity of the persons benefited is matched by the diversity of the means of conferring the benefit. The point is clearly established that in legislation affecting children other interests than those of the child are protected, safeguarded, benefited or promoted. The reasons are not uniform. Some may arguably include the child as an indirect object of the legislation; others clearly do not. Parliament seeks an acceptable balance of relevant interests; the interests of the child frequently predominate.

Section 6 - Regulation making powers

6.26 The Tables in this and the three preceding chapters contain many examples of subordinate legislation. Such legislation fills in the details of the broad structures contained in the Acts. Much of the subordinate legislation is procedural or administrative; it regulates the conduct of courts, children's hearings, adoption

agencies and those responsible for the day-to-day running of the various penal and non-penal institutions and for the day-to-day care of the children in question. The structure and nature of the subordinate legislation reflects these various functions. The procedural rules governing courts and children's hearings are on the whole specific, concise and intelligible. This is not always true of some of the administrative regulations. Admittedly some are quite specific in their requirements but the standard required is often expressed functionally; for example, the provision of reasonable, adequate or sufficient accommodation, food, hygiene, medical and dental services and so on. Adequate or sufficient for what? The standard is set functionally by reference to stated objectives and principles. Courts do not normally adjudicate upon such matters. But if a court were involved, it could, depending upon the nature of its jurisdiction, reach a proper decision on these matters.

6.27 The concept of justiciability is difficult. Perhaps it should be treated widely. The public do not normally question the legality or the adequacy of the facilities, services and treatment provided in these institutions by means of litigation. Other means of criticism are probably easier to initiate and more likely to succeed. It is nevertheless suggested that there is no reason in principle why the inmate of a prison, Borstal, home or other institution should not query

through the judicial process the adequacy of his treatment in terms of the standard laid down by Parliament or with Parliamentary approval and consent.

6.28 But such arguments go beyond the present legal system. Probably very few items of delegated legislation in the various Tables are in this sense justiciable, with the important exception of the various rules of procedure. The substance of the decision is likely to be beyond legal challenge. The various rules and regulations depend for their validity upon their enabling Acts. A possible ground of challenge may be the relationship between the Act and the subordinate legislation. Table 10 contains several of these enabling provisions.

TABLE 10

REGULATION MAKING POWERS

Provisions of Acts of Parliament

Section

Provision

Children Act 1948 (11 & 12 Geo. 6, c.43): Eng.

1948 s.14(1) Regulations to make provision for the welfare of children boarded out by local authorities.

1948 s.31(1) Regulations as to the conduct of voluntary homes and for securing the welfare of the children therein.

<u>Section</u>	<u>Provision</u>
1948 s.33(1) and (2)	Regulations to control the making and carrying out by voluntary organisations of arrangements for the emigration of children, including suitable arrangements for the children's reception and welfare in the country to which they are going.
<u>Criminal Justice Act 1948 (11 & 12 Geo. 6, c.58): Eng.</u> <u>Criminal Justice (Scotland) Act 1949 (12, 13 & 14 Geo. 6, c.94): Scot.</u>	
1948 s.46(2) 1949 s.12(2)	Rules for the regulation, management and inspection of approved probation hostels and of approved probation homes.
<u>Prison Act 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c.52): Eng.</u> <u>Criminal Justice (Scotland) Act 1949 (12, 13 & 14 Geo.6 c.94): Scot.</u>	
1952 s.47 1949 s.53(1)	Rules for the regulation and management of prisons, remand centres, detention centres and borstal institutions respectively and for the classification, treatment, employment, discipline and control of persons required to be detained therein.
<u>Social Work (Scotland) Act 1968 (1968 c.49): Scot.</u>	
1968 s.5(3)	Regulations to make provision for the boarding-out of persons by local authorities and voluntary organisations.

<u>Section</u>	<u>Provision</u>
1968 s.35(4)	Rules for the constituting and arranging of children's hearings and for regulating the procedure of those hearings.
1968 s.36(8)	Rules in relation to the duties of the reporter.
1968 s.60(1)	Regulations as to the conduct of residential and other establishments and for securing the welfare of persons resident or accommodated in them.

Children and Young Persons Act 1969 (1969 c.54): Eng.

1969 s.43(1)	Regulations with respect to the conduct of community homes and for securing the welfare of the children in community homes.
1969 s.61(1)	Rules relating to juvenile court panels and composition of juvenile courts.

Children Act 1975 (1975 c.72): Scot.

Adoption Act 1976 (1976 c.36): Eng.

1975 s.20(1)	Rules for providing for the appointment
1976 s.65(1)	of a curator (guardian) ad litem and of a reporting officer in adoption proceedings.

6.29 Most of the examples in Table 10 are widely drawn providing generally for the management of the institution or the procedure to be followed by the court or the hearing. It would be difficult to challenge successfully any rules or regulations made under such enabling powers. A few instances in Table 10 however relate to the welfare of the child: for example, the boarding out of children and the conduct of voluntary homes under the Children Act 1948, the conduct of residential establishments under the Social Work (Scotland) Act 1968 and of community homes under the Children and Young Persons Act 1969. The latter are very much part of the concept of planning and management built into the 1969 Act and the regulations and the instrument of management must be taken together in the individual case to enable the specific pattern of treatment to emerge. This emphasises the general tendency to deal administratively with the individual problem rather to conceive of potentially inappropriate or meaninglessly wide generalities.

6.30 These references to securing the welfare of the children in the various establishments are sometimes supported by more specific components of the regulations: for example, sections 14(2) and 31(1)(a) to (f) of the Children Act 1948, sections 5(3)(a) to (d) and 60(1)(a) to (f) of the Social Work (Scotland) Act 1968 and section 43(2) of the Children and Young Persons Act 1969. Even these more specific aspects are relatively general and

include such obvious matters as the material and physical well-being of the children and more often than not a reference to their religious education. They confirm rather than add to the classification contained in these chapters. The generality of the enabling powers renders the chance of successful challenge of the administering authority's decision on the grounds of ultra vires very remote indeed.

Section 7 - Conclusion

6.31 This and the three preceding chapters, it should be recalled, have been concerned to analyse welfare as a statutory phenomenon only in a static fashion. The discretionary nature of a great deal of the legislation, either directly or implicitly, and the flexible meaning of the word itself certainly enable the system to give effect to the objective of individualised justice. This is no doubt deliberate. Although this is true overall, the system is not simply one of wide discretions, either judicial or executive. The role of welfare, even in this static context, is immensely complex. The restrictions upon the exercise of the discretions are firstly the need to satisfy the threshold requirements of the legislation and secondly the careful series of priorities, preferences and qualifications created by Parliament. But each of these types of restriction itself involves welfare and exhibits features of flexibility. Whether this static picture remains true of the system in practice remains to be seen. But the impression clearly is that a similar pattern emerges when the system is analysed dynamically.

CHAPTER 7

THE BACKGROUND TO WELFARE AS POLICY

Section 1 - Introduction

7.1 The mass of statutory rules affecting children, their interests and their relationships with other people is merely the reflection of the views of the legislature at any moment of time how to achieve a proper balance between the protection and promotion of the welfare of the child and the claims of other members of society. It is not the function of legal analysis to investigate the motives of Parliament: it is rather to consider what has been precisely enacted by the legislature. But in the law affecting children Parliamentary motives and objectives are more significant than in other areas of the law. It is sometimes difficult to identify what are the policy objectives, for the impression given by Parliament may not always appear clear and unambiguous, particularly in a sensitive area such as the regulation of the rights of parents and the interests of their children. Policy may nevertheless be often justifiably implied from the objective provision in issue.

7.2 It would be difficult to deny that the welfare of the child in one way or another forms the justification for many of the rules affecting children whether they relate to the substance of the law or to the most effective means of its administration in the best interests of the

child. Judicial disinclination to become involved in a search for policy objectives laid down by another body is understandable. Parliamentary policy may be found in the preamble to or the long titles of the statutes. They are in any event available to assist in statutory interpretation¹ in the event of ambiguity and together with Parliamentary debates and government reports² and the like they can be useful as indicative of general legislative policy. This assumes, of course, that the report met with the general approval of Parliament or the member was supporting the measure.

Section 2 - Victorian legislative policy.

7.3 To begin by investigating briefly some of the motives inspiring nineteenth century legislation: much remains effective in re-enacted and up-dated form and it is indicative of the relationship between legislative policy and the law. During the debate in the House of Commons on the introduction of the Access of Parents to Children Bill in 1837,³ the promoter of the measure stated

1 Maxwell, pp. 3 to 6 for the long title and pp. 6 to 9 for the preamble.

2 Not available to assist in interpretation: ibid. pp. 50 to 54.

3 Subsequently enacted as the Custody of Infants Act 1839 (2 & 3 Vict., c.54, "Talfourd's Act"). This Act, which merely gave a non-adulterous mother a right to apply to the court for access to her infant or for custody of her infant of no more than seven years of age, did not apply to Scotland, presumably because at that point of time it was not considered necessary.

the object to be "to confide to the judge at law and in equity the discretionary power of so far mitigating the law which enforces the right of one parent to refuse to the other access, at fitting seasons, to a child of tender age from whom she is divided by unhappy differences with its father."⁴ The Bill's seconder⁵ considered that it was designed "to afford fair protection to the weaker sex."⁶ The policy of the Bill therefore was not solely or even primarily to provide for the welfare of the child. The promoter of the Bill would clearly have wished to do more for the welfare of the children but he felt such a course would have been unacceptable at that point of time. The welfare of the child was later introduced, to some extent indirectly, as an incident of extending maternal rights.

7.4 These contemporary comments are conservatively Victorian in outlook but a small minority wished the law to go further in providing for the welfare of the children. For example, when an almost identical Bill,⁷ then entitled the Custody of Infants Bill, was before the House of Commons

4 (1837) 39 Parl. Deb. (H.C.) 3 s. col. 1087 (Sergeant Talfourd).

5 Mr. Leader.

6 (1837) 39 Parl. Deb. (H.C.) 3 s. col. 1090 (Mr. Leader).

7 The earlier Bill, after passing the Commons, was rejected by the Lords "accidentally".

in 1839, there was opposition on the ground that "the primary object of a Bill of this sort ought to be the care of the children whom the parents were separated from".⁸ Although there is a certain overlap in possible policies underlying this Act, they are not necessarily in conflict or inconsistent. This shows that the problems of ascertaining legislative policy objectives are considerable. It is, for example, in this instance impossible to be sure that the relevant policy has been identified.

7.5 More positive recognition of the welfare of the child in custodial legislation came later but it was preceded in the middle of the nineteenth century by a more child-orientated view of policy in the context of official care. The code of legislation now known generally in England as the Children and Young Persons Act⁹ and presently contained for the most part for Scotland in the Social Work (Scotland) Act 1968¹⁰ had its origins partly in the Reformatory Schools (Scotland) Act 1854,¹¹ the Industrial Schools Act 1857¹² and associated statutes and partly in the Prevention of Cruelty to and Protection of Children Act 1889.¹³ The long and short titles of the 1889 Act are almost identical and the legislative policy unquestionably

8 (1839) 48 Parl. Deb. (H.C.) 3s. col. 162 (Mr. Langdale).

9 In particular the Acts of 1933 (23 & 24 Geo. 5, c.12), 1963 (1963 c.37) and 1969 (1969 c.54).

10 1968 c.49: supported by the Children and Young Persons (Scotland) Act 1937 (1 Edw. 8 & 1 Geo. 6, c.37).

11 17 & 18 Vict., c.74.

12 20 & 21 Vict., c.48.

13 52 & 53 Vict., c.44.

is the protection of children. Equally clear is the concern implied in the preamble to the 1857 Act and in the long titles of the 1854 and 1857 Acts for the care and education by official means of vagrant, destitute and disorderly children. Concern for the child was not the sole Parliamentary consideration, for the preamble to the 1857 Act declared that "the responsibility of parents to provide for the proper care of their children should be enforced."

7.6 The late nineteenth century, it is generally recognised,¹⁴ saw an increasing emphasis on the welfare of the child in custodial statutes and other legislation affecting children. In the House of Commons debate on one of the earlier versions of the Infants Bill which became the Guardianship of Infants Act 1886¹⁵ Lord Advocate Balfour suggested that the "primary and governing consideration ought to be the welfare of the child, and where consideration for either parent comes in, it ought to be subordinate and collateral to that."¹⁶ Realisation of that hope, however, was postponed, for it was not until 1925¹⁷ that the principle of the paramountcy of welfare was entrenched in statute. The policy of the Bill was more accurately described in the House of Lords as designed to recognise certain maternal rights¹⁸ and the Bill overlooked the interests of children which were thus "sacrificed to the mother's sentiment."¹⁹

14 Bevan, pp.258 and 259. 15 49 & 50 Vict., c.27.

16 (1884) 286 Parl. Deb. (H.C.) 3s. col. 839.

17 Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c.45), s.1.

18 (1884) 291 Parl. Deb. (H.L.) 3 s. col. 1550 (Lord Fitzgerald).

19 (1885) 297 Parl. Deb. (H.L.) 3 s. col. 297 (Earl Beauchamp).

7.7 A different and more positive view of policy in relation to welfare may be found in the Custody of Children Bill in 1891:²⁰

"..... the Bill is intended to deal with . . . children who have been thrown helpless on the streets, and wickedly deserted by their parents, and who are taken by the hand by benevolent persons or by charitable institutions"²¹

Its purpose is to protect neglected children from their neglectful parents civilly by not enforcing parental rights. Such a policy anticipates to some extent considerations affecting twentieth century legislation in relation to custodial matters and it is entirely consistent with the motives inherent in the series of statutes culminating in the Children and Young Persons Acts and their Scottish counterpart.

Section 3 - Modern legislative policy.

7.8 The much stronger concept of welfare underlying legislative policy in the twentieth century emerges in a number of ways. The most significant statutory provision in relation to children generally is probably section 1 of the Guardianship of Infants Act 1925,²² the statutory basis

20 Which became the Custody of Children Act 1891 (54 & 55 Vict., c.3).

21 (1891) 350 Parl. Deb. (H.L.) 3 s. col. 120 (Earl of Meath).

22 This continues to apply in Scotland. The Guardianship of Infants Acts have been consolidated for England and Wales: Guardianship of Minors Act 1971 (1971 c.3), s.1.

of the principle of the paramountcy of welfare. During the Commons debate²³ one of the Bill's supporters described the aim of the measure as "promoting the welfare of the children." This may in some ways be an exaggerated claim but it does clearly indicate the basic philosophy supporting the statute.

7.9 The principle of the paramountcy of welfare does not apply in the context of adoption,²⁴ principally because of the weight placed upon the rights of the natural parents of the child to be adopted. Nevertheless it was considered appropriate to remark during the Parliamentary process²⁵ of the Adoption of Children Bill in 1926 that "the guiding principle ... must be the welfare of the child." This may have been true as an administrative guideline but until 1975 it was of doubtful validity in the context of a strict legal analysis. Similarly on a wider plane the Hurst Committee²⁶ in 1954 suggested that the "primary object ... in²⁷ the arrangement of adoptions is the welfare of the child." The Houghton-Stockdale Committee²⁸ has now recommended not only that "the long-term welfare of the child should be the first and paramount consideration"²⁹ but also that it should also be

23 (1925) 181 H.C. Deb. 5 s. col. 545 (Mr. Davies).

24 A new principle, the primacy of welfare, was created in 1975: Children Act 1975 (1975 c.72), s.3.

25 (1926) 192 H.C. Deb. 5s. cols. 927 and 928 (Mr. Rentoul).

26 Report of the Departmental Committee on the Adoption of Children (London, H.M.S.O., 1954) Cmd. 9248.

27 Ibid., p.4.

28 Report of the Departmental Committee on the Adoption of Children (London, H.M.S.O., 1972) Cmd. 5107.

29 Ibid., p.4., para. 17.

a matter of legal prescription.³⁰ The tendency in adoption as in custody is towards the principle of the paramountcy of welfare. In 1953 a study on adoption instigated by the United Nations³¹ felt justified in concluding that United Kingdom legislation "clearly aims at securing the welfare of the child."³² It would be difficult to deny that there have been clear indications to that effect but Parliament decided in 1975 to enact the primacy of welfare rather than the paramountcy of welfare as the guiding principle in adoption. What is the distinction is another matter altogether.³³

7.10 The policy underlying twentieth century legislation on children and young persons does not seem essentially different from the ideas which gave rise to the earlier industrial and reformatory schools legislation and the prevention of cruelty to children statutes, although the means of achieving such a policy have advanced considerably. When discussing the multi-functional position of juvenile courts in England, the Ingleby Committee³⁴ commented

30 Ibid., p.4, para. 18.

31 Study on Adoption of Children: a study on the practice and procedures related to the adoption of children. (New York, United Nations, Department of Social Affairs, 1953).

32 Ibid., p.11.

33 See paras. 25.8 to 25.9.

34 Report of the Departmental Committee on Children and Young Persons (London, H.M.S.O., 1960) Cmnd. 1191.

"It must try at one and the same time to protect the public, to promote the welfare of the child and to stress the responsibility and respect the legitimate rights of the parents. Finally it must satisfy public opinion that justice is being done."³⁵

One of these ideas is reflected in one of the purposes of the Children and Young Persons Bill of 1968, described by the Home Secretary³⁷ in these words:-

"..... to build on the family and on the parents, to try to ensure that they assume the major responsibility for the welfare, control, care and discipline of their children."³⁸

7.11 The pursuit of similar motives influenced the earlier Kilbrandon Report³⁹ and the Social Work (Scotland) Act 1968 but the detailed solutions put forward for Scotland contain basically different ideas.⁴⁰ The long title of the 1968 Act discloses in the first few words a most ambitious object: "to make further provision for promoting social welfare in Scotland." The Act applies to the community at large, not merely to children. This general object is achieved partly by placing a duty on every local authority "to promote social welfare"⁴¹ in the prescribed ways and

35 Ibid., p.39. 36 Which became the Children and Young Persons Act 1969 (1969 c.54).
 37 Mr. Callaghan. 38 (1968) 779 H.C. Deb. 5s. col. 1176.
 39 Report of the Committee on Children and Young Persons: Scotland (Edinburgh, H.M.S.O., 1964) Cmd. 2306.
 40 One of the most concise descriptions of the differences may be found in Walker N., Sentencing in a Rational Society (Pelican, 1972), pp. 214 and 215.
 41 1968 Act, s.12.

partly in relation to children by the powers confided to the new institutions created by the Act, namely children's reporters and children's hearings.⁴² Some of the provisions⁴³ of the Act of 1968 were originally enacted in the Children Act 1948⁴⁴ which still applies in England. The long title of that Act discloses a more modest objective:-

"An Act to make further provision for the care or welfare ... of boys and girls when they are without parents or have been lost or abandoned by, or are living away from, their parents, or when their parents are unfit or unable to take care of them, and in certain other circumstances."

Similarly the main object of the Children Act 1958,⁴⁵ which still largely applies to Scotland as well as to England, is, in terms of the long title, "to make fresh provision for protection of children living away from their parents"

7.12 More recent examples may be found in the Parliamentary debates on the Indecency with Children Bill in 1960.⁴⁶ The speech of the Lord Chancellor⁴⁷ centred largely upon the welfare and the protection of children: "I believe it is our first duty to protect children."⁴⁸ Similarly in relation to the Matrimonial Proceedings (Magistrates' Courts)

42 Ibid., Part III.

43 Particularly those relating to the reception of children into the care of local authorities and the assumption of parental rights by local authorities.

44 11 & 12 Geo. 6, c.43. 45 6 & 7 Eliz. 2, c.65.

46 Which became the Indecency with Children Act 1960 (8 & 9 Eliz. 2, c.33).

47 Viscount Kilmuir: see (1960) 221 H.L. Deb. 5s. cols. 34 to 39.

48 Ibid., cols. 38 and 39.

Bill in 1960⁴⁹ he explained that "the whole basis of our legislation ... is that the interest of the child must be the governing factor."⁵⁰ That Bill included the concept of "accepting" a child as a child of the family for the purpose of conceding jurisdiction to the court in custody and other matters. In welcoming the Government amendment to give effect to this concept⁵¹ Lord Silkin remarked: "It is indeed evidence of the fact that we all regard the interests of the child of the family as paramount."⁵² These are strong words; it is perhaps questionable how far paramountcy is relevant in that context, which concerns the application rather than the implementation of the legislation.

7.13 On the other hand the paramountcy principle was not an issue in the debates on one of the most recent statutes affecting children, the Guardianship Act 1973.⁵³ Clause⁵⁴ 1 had no bearing upon welfare at all. The sponsoring Minister⁵⁵ explained that clause 1 was intended to provide "for equality between husband and wife in the matter of the guardianship of their children."⁵⁶ This is directed to the

49 Which became the Matrimonial Proceedings (Magistrates' Courts) Act 1960 (8 & 9 Eliz. 2, c.48).

50 (1960) 221 H.L. Deb. 5s. col. 387.

51 By substituting "child of the family" for "child of the marriage."

52 (1960) 221 H.L. Deb. 5s. col. 388. 53 1973 c.29.

54 Clause 10 for Scotland, becoming respectively sections 1 and 10 of the Act.

55 Viscount Colville, Minister of State at the Home Office.

56 (1973) 339 H.L. Deb. 5s. col. 19. Reflected in the ministerial speech in the Commons: see (1973) 856 H.C. Deb. 5s. col. 425 (Mr. Mark Carlisle).

static relationship⁵⁷ between husband and wife; parental equality is not the criterion in the event of an inter-parental judicial dispute over the child.⁵⁸ On the other hand most of the other provisions in the Bill were more positively directed towards the welfare of the child. This result was achieved indirectly by the conferment of powers on various bodies and by prescribing appropriate procedures.⁵⁹ Speaking of clauses 11 to 13, the Minister⁶⁰ clearly acknowledged the "needs of the child"⁶¹ as the object of the legislation. The proceedings leading to the 1973 Act therefore disclose two points: welfare may be protected or promoted by administrative and procedural means,⁶² and legislation affecting children may be directed not towards welfare but to parental rights and other interests.

7.14 The pattern disclosed by the preceding paragraphs is to some extent clear. Welfare of children as a desideratum of legislative policy is more significant now than earlier and it is an item of increasing significance. Its precise role depends on the legislation in question and that is a matter for close legal analysis. On the other hand policy in this area is rather vague and susceptible of

57 In the sense that the parties are not litigating about the child.

58 Cf. Guardianship of Infants Act 1925, s.1 for Scotland; Guardianship of Minors Act 1971, s.1 for England.

59 E.g. clauses 3, 4, 5 and 7 for England and clauses 11 and 12 for Scotland.

60 Viscount Colville. 61 (1973) 339 H.L. Deb. 5s. col. 26.

62 This is true also of the Children Act 1975.

several interpretations. It is not suggested that there is necessarily any uniformity of policy disclosed by these various propositions in relation to the welfare of the child. They would seem however not to be inconsistent. Their common denominator is welfare in several different respects. The legislation discussed may, and in many instances does, purport to achieve objectives other than securing or promoting the welfare of children.⁶³ Welfare as an item of policy is multi-faceted.

63 E.g. protecting parental and other rights and interests; devising appropriate procedures; securing the interests of justice so far as consistent with the other objectives.

CHAPTER 8THE RELEVANCE OF WELFARE AS POLICYSection 1 - Introduction

8.1 Policy as such is not normally a matter for legal analysis but would appear that the welfare of the child as an incident of legislative policy may be an exception to that proposition. The welfare of the child is the subject of statutory regulation in several different ways: the court, for example, may be given an element of discretion in reaching a particular decision or the Act itself may prescribe in detail the standard of behaviour contemplated by the legislature. In that event it would be normal for the court to do little more than give effect to the literal meaning of the words used by Parliament. Where the court has a discretion on the merits of its decision, there will be only limited scope for legislative policy to play a part in interpretation. A middle course is where the Act itself circumscribes the rule pertaining to the welfare of the child, without prescribing it in detail; in that case there will be greater scope for the court to adopt a more imaginative approach to questions of interpretation. In the discretionary situation, the question facing the court is to identify the

proper approach to the issue for determination; the latter situation concerns the meaning and construction of particular words. Policy may play a significant but different part in each of these contexts.

8.2 There is another way of looking at interpretation. A great deal of the law relating to children is structural; that is, it creates the framework for making decisions about the child. From that it is understandable that many of the most important substantive decisions affecting children are largely discretionary in nature. Even when the legislation provides for the exercise of the discretion, often in terms of welfare, the criteria for its exercise are flexible, in the sense that the words used to describe the criteria are neither certain nor precise¹. Before the statutory powers may be exercised, certain requirements have to be met. Some of them relate to welfare and form part of the overall approach to the issue in question². Others have nothing to do with welfare. They are nevertheless fundamental to the system and in that sense jurisdictional. These requirements may be implicit; for example, the existence of relationship of parent and child, guardian and ward, tutor and pupil and the consequential matters of relationship³, paternity⁴, legitimacy or illegitimacy⁵.

1 I.e. interpretational discretion.

2 With which most of this analysis is concerned.

3 Craig v. Craig & Macdonald (1863) 1 Macpherson 1172; AB and CB 1961 S.C. 347.

4 In Scotland, McWhirter v Lynch (1908) 16 S.L.T. 526; Sproat v McGibney 1967 S.L.T. (Notes) 100; in England Gordon v Gordon & Bell [1903] P.92; Re Wakeman. Wakeman v Wakeman [1947] 1 Ch. 607.

5 Dredge v Dredge [1947] 1 AllE.R. 29; L. v L. [1949] 1 AllE.R. 141.

legitimation,⁶ succession or appointment to the office⁷ or whatever. Welfare normally plays no part in these questions, which are ultimately issues of status. These requirements may also be part of the legislation; for example, is the child one to whom the legislation applies,⁸ does the legislation apply to the proceedings.⁹ Parliament has over the years attempted to simplify these questions and extend the jurisdiction by subjecting more children to it, particularly in matrimonial and consistorial proceedings.¹⁰ The legislation has however been drafted to some extent in fairly general and flexible terms and the policy of the legislation has sometimes proved helpful to the courts in construing expressions containing such issues of "interpretational discretion" or linguistic flexibility.

Section 2 - The Normal Approach.

8.3 Interpretation in the normal case is essentially a question of identifying the literal meaning¹¹ of the words

6 In Scotland, Hume v Macfarlane (1908) 16 S.L.T. 123: in England, Green v Green [1929] P.101; Colquitt v Colquitt [1948] P.19.

7 A. & J. Robertson, Petitioners (1865) 3 Macpherson 1077.

8 In Scotland, Hart v Hart 1961 S.L.T. (Notes) 14: in England, Snow v Snow [1971] 3 AllE.R. 833.

9 E.g. does the Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c.45) s.1 apply to matrimonial and consistorial proceedings?

10 Matrimonial Proceedings (Children) Act 1958 (6 & 7 Eliz. 2, c.40).

11 Maxwell, pp. 28 and 29.

used. Other techniques of interpretation are normally available only in case of doubt, ambiguity or absurdity. This does not necessarily imply an excessively rigid approach. Indeed in 1966 Cross J. found it necessary to make a practice direction¹² that rule 11 of the Adoption (High Court) Rules 1959¹³ should be strictly complied with. The rule in question prescribes a time limit for filing an affidavit and regulates service of the affidavit. It is obviously an important matter of procedure prompted perhaps less by a desire to secure the welfare of the child and more by a desire to achieve fair administration of the law.

8.4 A certain judicial strictness may be appropriate when a statute attempts to interfere with recognised common law rights or when a penalty is imposed.¹⁴ Education legislation, for example, involves an invasion of parental rights to some extent. This may be justified by a desire to promote the educational welfare of children but in MacAulay v MacDonald¹⁵ the High Court of Justiciary in

12 [1966] 1 AllE.R. 960.

13 S.I. 1959 No. 479. Rule 11 has now been re-enacted as rule 12(1) of the Adoption (High Court) Rules 1971 (S.I. 1971 No. 1520).

14 Maxwell, pp. 251 to 256 and pp. 238 to 240 respectively.

15 (1887) 14 Rettie (J.C.) 43.

Scotland chose to ignore that aspect of the legislation and sought rather to protect the rights or interests of parents. Lord Young put forward the view:-

"It is always a delicate matter to interfere with a parent in the education of his children, and therefore the compulsory provision of the statute ought to be enforced with great discrimination and forbearance."¹⁶

A procedural irregularity affecting the parent was sufficient in that case for the High Court to suspend a conviction on a charge of statutory failure to educate the children.¹⁷ It indicates the dilemma which a court may have to face when legislative policy may point in more than one direction. A determination of one item of legislative policy is sufficiently problematical without the need to ascertain two such policies.

3.5 A similar attitude appears in the judgment of the Lord Justice-Clerk in France v Anderson¹⁸ where the conviction of a parent for statutory failure to provide education for his children was set aside by reason of a procedural defect perpetrated by the school board.¹⁹ The court proceeded upon the basis that the discretion of

16 Ibid. at p.44 per Lord Young.

17 Education (Scotland) Acts 1872 (35 & 36 Vict., c.62) and 1883 (46 & 47 Vict., c.56).

18 Lord Moncrieff.

19 (1877) 4 Rettie (J.) 42.

20 Education (Scotland) Act 1872, s.70.

parents in matters of education should not be subjected to unwarrantable interference. An insistence upon a strict compliance with the rules by the school board was, of course, quite consistent with that view but the Lord Justice-Clerk adopted a slightly abnormal approach when he said:-

"..... if I had thought that the spirit of the statute had been complied with, I might not have been so careful to insist upon the letter. But I think that here the spirit of the statute has been departed from."²¹

Thus both the spirit and the letter of the law had been infringed. There was no problem for the court. But the germ of an idea begins to appear that strict compliance with the rules of interpretation may not necessarily be the most suitable approach. The concept of welfare may be the justification for such a course. This analysis is intended to ascertain in what ways the idea of welfare in different respects bears upon the interpretation of statutes affecting children.

Section 3 - The Exceptional Approach in England.

(a) Introduction.

8.6 These random examples are symptomatic of the usual judicial approach to interpretation: special rules founded on legislative policy are essentially exceptional. Welfare as a matter of legislative policy forms the justification for this exception and policy generally is the vehicle for

21 (1887) 4 Rettie (J.) 42 at p.47.

this rule of interpretation. The use of policy as an aid to interpretation emerges in several ways: for example, the court may take a liberal view of the enactment; they may regard the protection of the child as the significant aspect of the Act; or they may be inspired by what is conceived to be the "spirit" of the law.²² This chapter, however, is concerned not with the content of the policies in question²³ but with their relevance to interpretation.

8.7 There is in some respects a marked diversity of approach between the courts of Scotland and those of England. It is impossible to quantify this difference but the impression is that the English judges on the whole, apart from the mere numerical superiority of their reported judgments, are inclined to be more imaginative in their use of policy. Their Scottish counterparts favour the more traditional methods of interpretation.

(b) English matrimonial legislation.

8.8 One of the more obvious uses of policy as the basis of interpretation relates to the exercise of a judicial discretion. This is at first sight rather inconsistent with the pattern already described but²⁴ this is not so, as the provision in question simply circumscribes the power of the court by prescribing the

22 Chapters 9 and 10.

23 Idem.

24 Paras 8.1 and 8.2.

essential conditions for its exercise without directing²⁵ how it should be exercised. In Cammell v Cammell the English Divorce Court was concerned with the basis of its jurisdiction to grant ancillary relief under section 26²⁶ of the Matrimonial Causes Act 1950. Scarman J. based his decision to some extent upon the following proposition:-

"In my view, however, the court in construing the statute should have regard [not only to but also] to the policy of the law that, where in any proceeding before any court the custody or upbringing of an infant is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration Such being the policy of the law in relation to children, I would be loth to read into section 26 of the Matrimonial Causes Act 1950 a limitation on the jurisdiction of the court which Parliament has not by express²⁷ words introduced into the section."

The paramountcy of welfare principle, by then embodied in²⁸ section 1 of the 1925 Act, was thus treated as a rule of legal policy. As such it was used to justify an interpretation favourable to children upon a statutory provision conferring jurisdiction on the court.

25 [1964] 3 AllE.R. 255. 26 14 Geo. 6, c.25.

27 [1964] 3 AllE.R. 255 at p. 258.

28 Guardianship of Infants Act 1925 (15 & 16 Geo. 5, c.45).

8.9 The same section of the 1950 Act was considered
by the House of Lords in 1955 in Galloway v Galloway.²⁹

The issue was different from that in the later case. A
majority of the House of Lords took the view that custody³⁰
could be competently regulated in divorce proceedings with
regard to the parties' illegitimate child born before their
marriage. The decision turned on two arguments. The
expression "children" normally included only legitimate
children unless the context otherwise required. The context
in question required a different interpretation. This was
supported by the second argument that the conferment of
jurisdiction with respect to illegitimate as well as
legitimate children was "more consonant with the object"³¹
of the relevant Act.³² Lord Tucker also acknowledged that
the object of an Act might justify the decision and that
in the immediate context the concept of welfare was an aid
to statutory interpretation.³³ Reliance upon this approach
may not be necessary, for according to Lord Tucker:-

"... where I find a strict construction
which results in enabling the court to
do that which justice clearly requires
in the interest of an infant child, I
am the less inclined to reject a
literal interpretation by attributing
a lack of enlightenment to Parliament
in 1857."³⁴

29 [1955] 3 AllE.R. 429.

30 Lords Oaksey, Radcliffe
and Tucker; Lords Simonds
and Cohen dissenting.

31 [1955] 3 AllE.R. 429 at
p.435 per Lord Oaksey.

32 The statute in question was the Matrimonial Causes Act
1857 (20 & 21 Vict., c.85) which in this regard was no
different from the legislation in force in 1955.

33 [1955] 3 AllE.R. 429 at p.441.

34 Idem.

The majority of the House of Lords did not appear to feel it necessary to analyse profoundly the object or policy of the relevant statutory provisions. It seemed to be assumed, however, that the Act was intended to protect children, irrespective of their legal status. There would thus be no logical reason to distinguish between legitimate and illegitimate children in this context.

8.10 The basis of jurisdiction over children in matrimonial proceedings has been amended by statute over the years to substitute "child of the family"³⁵ for "child of the marriage."³⁶ The current concept is defined to include a child not of both parties to the marriage who has been treated by both parties as a child of the family.³⁷ The context of these provisions is similar. It would, therefore, be reasonable to expect a similarity of approach to statutory interpretation. Whatever the proper construction of section 26 of the Matrimonial Causes Act 1950 apart from reliance upon the policy of the Act, it is suggested that the majority of the House of Lords has been proved right, at least on a social and political plane, by virtue of the subsequent trend in the legislative provisions terminating in the current concept "child of the family." It is expected therefore that the current legislation will be interpreted in a way consistent with the object of the Act.

35 Matrimonial Causes Act 1973 (1973 c.18), s.52(1).

36 Matrimonial Causes Act 1950, s.26 (now superseded); Matrimonial Proceedings (Children) Act 1958 (6 & 7 Eliz. 2 c.40), s.7(1) (still in force).

37 Bevan, pp. 280 and 281; Clive & Wilson, pp. 578 to 580. The positions in England and Scotland are not the same.

8.11 The case of W(RJ) v W(SJ)³⁸ was concerned with the definition of "child of the family" in section 27(1) of the Matrimonial Proceedings and Property Act 1970.³⁹

Similar provisions had been the subject of considerable judicial analysis, including those already mentioned, but in that case counsel for the children⁴⁰ introduced a more positive line of argument when he submitted that "the legislature must have wanted to extend rather than to restrict the categories of children who would be children of the family."⁴¹ Park J. did not expressly endorse this argument but his judgment⁴² implied acceptance of the essence of the submission so that he clearly favoured an interpretation favourable to the children and contrary to the interests of the parties to the proceedings. This approach is a direct use of policy to interpret the Act.

8.12 Corresponding provisions are to be found in the legislation conferring jurisdiction upon magistrates' courts in matrimonial proceedings. Section 16(1) of the 1960 Act⁴³ was analysed in Kirkwood v Kirkwood⁴⁴ and Snow v Snow.⁴⁵

38 [1971] 3 AllE.R. 303. 39 1970 c.45.

40 An interesting and significant procedural point.

41 [1971] 3 AllE.R. 303 at p.304.

42 Which concluded that the children in question were children of the family within the statutory definition.

43 Matrimonial Proceedings (Magistrates' Courts) Act 1960 (8 & 9 Eliz. 2, c.48).

44 [1970] 2 AllE.R. 161. 45 [1971] 3 AllE.R. 833.

The issue again was the position of the court in relation to children who were born to one party and allegedly "accepted" by the other party to the proceedings. In Kirkwood v Kirkwood⁴⁶ Ormrod J. expressed a clear view of legislative policy:-

"The relevant provision in the Matrimonial Proceedings (Magistrates' Courts) Act 1960, and the provisions in the Matrimonial Causes Act 1965 of a corresponding nature, are clearly designed primarily for the protection of children who are in this position of being children of one spouse and not the other; and, if this court were to lay down that acceptance involves something approaching a contractual arrangement so that it would be vitiated by non-disclosure or something of that kind, we might be driving a very large wedge into this statutory provision....."⁴⁷

The view of Sir Jocelyn Simon P.⁴⁸ was couched in similar language.

8.13 It is clear so far that the protection of children may well be the object or policy of the legislation in question. But it may not necessarily be the sole object or policy, or even the predominant or paramount object or policy. In Snow v Snow⁴⁹ Sir Jocelyn Simon P. identified two "clear" objects of the statutory provisions⁵⁰ in question: first, "to give protection to children"; and second "that

⁴⁶ [1970] 2 AllE.R. 161.

⁴⁷ Ibid. at p.164.

⁴⁸ [1970] 2 AllE.R. 161 at p.167.

⁴⁹ [1971] 3 AllE.R. 833.

⁵⁰ Matrimonial Proceedings (Magistrates' Courts) Act 1960, ss.1, 2, 4 and 16(1).

justice shall be done as between the husband, the wife and any other person concerned."⁵¹ It is, of course, a separate and unresolved question which policy takes precedence. An answer to that question may be unnecessary if there is in the circumstances no conflict or inconsistency between the policies. Nevertheless the relevance of protection of the child as a statutory policy available to assist interpretation has been established by these two cases. The relevance of policy is only a secondary issue, although it is essential to the use of policy as an aid to statutory interpretation. The principal consideration is the substance of the policy. It is recognised that in practice it may be difficult to isolate the relevance of policy from the substance of policy but that distinction is drawn at this point in this analysis.

(c) English guardianship and custody legislation.

8.14 The difficulty if not the impossibility of identifying the policy of an Act has been demonstrated forcibly by Rigby J. In In re A and B (Infants)⁵² he was obliged to consider the Guardianship of Infants Act 1886.⁵³ He took the view that the purpose of the Act was probably the conferment of new rights on the mother, but rights not necessarily equal to those of the father. The welfare of the child was obviously a matter of importance⁵⁴ to the exercise of the discretion in section 5 of the Act but

51 [1971] 3 AllE.R. 833 at p. 854.

52 [1897] 1 Ch. 786 at p.792. 53 49 & 50 Vict., c.27.

54 [1897] 1 Ch. 786 at pp. 793 to 795.

Rigby J. failed to describe the welfare of the child as even a secondary object of the Act. Later analysis will show that such an assessment is probably correct.⁵⁵

(d) English adoption legislation.

8.15 The fundamental object of adoption legislation may be a matter of dispute, particularly with regard to the significance or even relevance of the welfare of the child and to the balance between welfare and parental rights. But legislative policy, whatever its content, would seem to be as relevant to the legal consequences of an adoption order as it is to the desirability of such an order. In Fletcher,⁵⁶ for example, the issues were whether adopted children were included as beneficiaries under the testator's will and the admissibility of evidence of the testator's relationship with the children in question. In his interpretation of section 5(2) of the Adoption of Children Act 1926,⁵⁷ Roxburgh J. placed considerable weight upon his view of what Parliament intended:-

"It is unthinkable that Parliament intended to place an adopted child in a worse position than an illegitimate child I feel bound to hold that s.5, sub.-s.2, does not exclude, in the case of an adopted child under the Act of 1926, any evidence which would have been admissible in the case of an illegitimate child."⁵⁸

55 Ch. 34. 56 In re Fletcher decd., Barclays Bank Ltd. v Ewing and others [1949] 1 Ch. 473.

57 16 & 17 Geo. 5, c.29.

58 [1949] 1 Ch. 473 at p. 481.

In the event the evidence thus rendered admissible was sufficient to enable the court to treat the adopted children as the testator's intended beneficiaries.

(e) English criminal legislation.

8.16 The use of legislative policy for purposes of interpretation may also be significant in a criminal context. A looser approach to interpretation may be understandable in civil proceedings, but perhaps less understandable in criminal proceedings, for statutes creating crimes and imposing penalties are normally construed strictly.⁵⁹ But the protection of children by means of the criminal law operates by virtue of statutes which govern the behaviour of parents and others vis-à-vis children. The court in effect faces a dilemma of policy: whether to interpret the provision strictly in favour of the offending parent or other person maltreating the child; or whether to interpret the provision in favour of the children in so far as they are the beneficiaries of the legislation. In R. v Hale⁶⁰ the court resolved such a dilemma by selecting an interpretation favourable to the accused. Section 16 of the Prevention of Cruelty to Children Act 1894⁶¹ provided that a charge of wilful neglect could not be proceeded with in the absence of the child allegedly neglected except where the court was satisfied that attendance would involve danger

59 Maxwell, pp.238 to 240. 60 [1905] 1 K.B. 126.

61 57 & 58 Vict., c.41.

to the life or health of the child and that the evidence of the child was not essential to a just hearing. Lord Alverstone C.J. took the view that:-

"The section however may have been enacted in the interests of the prisoner to point out that where the child's evidence was really essential to the just hearing of the case the court should not dispense with its presence."⁶²

An element of choice was thus introduced to solve the dilemma by enabling the judge to select the predominant legislative policy. The maxim of strict interpretation in a criminal context was not disregarded; it was modified to meet the special circumstances of legislation affecting children.

8.17 In Williams,⁶³ for example, a father was charged with neglecting and exposing his children contrary to section 12(1) of the Children Act 1908.⁶⁴ Counsel for the father argued that a narrow view should be taken of "expose"; namely, "physically place children somewhere with intent to injure."⁶⁵ Darling J. declined to accept that argument and dealt with the matter more broadly:-

62 [1905] 1K.B. 126 at p.130.

63 (1910) 4 Cr. App. Rep. 89.

64 8 Edw. 7, c.67.

65 (1910) 4 Cr. App. Rep. 89 at p. 93.

"The statute however tries to prevent unnecessary suffering and the prisoner had dragged the children about the roads instead of providing them with shelter."⁶⁶

The father's conviction stood.

8.18 Evidence of a similar approach is to be found in R. v Connor⁶⁷ where Lord Alverstone C.J. referred to "the intention of the legislature as early as 1868⁶⁸ to make a parent who neglected to provide adequate food for his children in his custody amenable to the criminal law,"⁶⁹ as an aid to interpreting section 1 of the Prevention of Cruelty to Children Act 1904.⁷⁰ Again, in R. v Senior⁷¹, the father of a child who had died was charged with wilful neglect by failing to provide medical aid and medicine for the child contrary to section 1 of the Prevention of Cruelty to Children Act 1894.⁷² The essence of the offence was carefully analysed by the Chief Justice and his argument to some extent was based on the view that:-

"... the provisions of the Act of 1894 shew an increased anxiety on the part of the legislature to provide for the protection of infants."⁷³

The decision of the court in these two cases was thus founded partially upon a construction of the statute consistent with the judicial statement of legislative policy.

66 Idem.

67 [1908] 2 K.B. 26.

68 Poor Law Amendment Act 1868 (31 & 32 Vict., c.122), s.37.

69 [1908] 2 K.B.26 at p.30.

70 4 Edw. 7, c.15

71 [1899] Q.B. 283.

72 57 & 50 Vict. c. 41

73 [1899] 1 Q.B. 283 at p. 290.

(f) Miscellaneous English legislation.

8.19 The legislative policy underlying any statute may be described in a number of different ways; for example, policy, intention, purpose, object. A different method of referring to policy was employed in Re Carlton: re the Naturalisation Act 1870.⁷⁴ The issue was whether the words "children" or "child" meant any or every son or daughter of a particular person or whether it included only infant sons or daughters. If the former, British nationality could be imposed upon a son or daughter of any age on the application of the father; if the latter, only children under the age of twenty one could be affected. Cohen J.⁷⁵ looked closely at the "context" of the provision and came to the conclusion that the more restricted meaning was intended.⁷⁶ Reference to the "context" of a statutory provision is perhaps a less unusual aid to statutory interpretation than the use of policy as such. In practice there is no doubt little difference between the two approaches. Another interesting aspect of this case is that welfare as an object of legislative policy does not necessarily require a liberal reading of the statute; a strict view, as here, may conduce to the welfare of the child.

74 [1945] 1 AllE.R. 559.

75 Ibid. at p. 561.

76 Affirmed by the Court of Appeal: [1945] 2 AllE.R. 370.

Section 4 - The Exceptional Approach in Scotland.

(a) Introduction.

8.20 It has already been commented that the judges in the Scottish courts rely more upon traditional and less upon imaginative approaches to interpretation than their English counterparts.⁷⁷ Nevertheless there is a broad consistency of approach within the two systems. It is worthwhile to assert this point clearly as otherwise the marginal differences may throw out of balance the basic similarity. Uniform interpretation of identical statutory provisions in English and Scottish legislation may be desirable, particularly when children are affected.⁷⁸

(b) Scottish criminal legislation.

8.21 The issue in Henderson v Stewart⁷⁹ was whether a father had wilfully neglected his young son by declining deliberately to maintain him contrary to section 12(1) of the Children and Young Persons (Scotland) Act 1937.⁸⁰ The corresponding provisions in the Children Act 1908⁸¹ had been judicially interpreted in England and the Lord Justice-⁸²

77 Para. 8.7. For example, in L., Petitioner 1951 S.C. 605 at p.607 Lord Cooper L.P. applied the doctrine of precedent somewhat rigidly, although he was inclined to doubt its validity.

78 Henderson v Stewart 1954 J.C. 94 at p. 98 per Lord Cooper L.J.-G.

79 1954 J.C. 94.

80 1 Edw. 8 & 1 Geo. 6, c.37.

81 8 Edw. 7, c.67.

82 Liverpool Society for the Prevention of Cruelty to Children v Jones [1914] 3 K.B. 813; Brooks v Blount [1923] 1 K.B. 257.

⁸³
General founded upon the desirability of uniform interpretation, particularly in relation to legislation designed to promote welfare. Lord Cooper put his view very concisely:-

"The interpretation so placed upon the Act has stood for upwards of thirty years, and, even if I took a different view, which I do not, I should regard it as quite impossible now to apply a different construction to provisions which are operative throughout the United Kingdom and which the English courts have so read as to promote materially the furtherance of child welfare and the prevention of cruelty to children, which are the objects to which this part of the statute is directed."⁸⁴

Legislative policy is thus relevant in Scotland to the interpretation of statutes concerning children.

8.22 The welfare of the child as a policy factor does not mean that a liberal interpretation⁸⁵ of the relevant statutory provision is necessary. It is more fundamental than that. Section 120(1) of the Children Act 1908, for example, provided that "the holder of the licence of any licensed premises shall not allow a child to be at any time in the bar of the licensed premises except during the hours of closing....." In Donaghue v McIntyre⁸⁶ the question was whether a small partitioned box or apartment in the corner of the bar was part of the licensed premises. The Lord Justice-Clerk⁸⁷ took the view that the purpose of the

83 Lord Cooper.

84 1954 J.C. 94 at p. 98. 85 Chapter 10. 86 1911 S.C.(J) 61.

87 Sir J.H.A. Macdonald.

provision was "to prevent children being brought into contact with people who frequent the bar and with what is⁸⁸ called the atmosphere of the bar of the premises." That objective was achieved by a literal interpretation of the words in the statute since the "box" would not be physically in contact with the frequenters of the bar. In this instance the optimum had been achieved: the policy and phraseology of the statutory provision were fully harmonious and integrated.

8.23 This may well be true of Donaghue v McIntyre,⁸⁹ but the circumstances of that case imply a concept of welfare which is narrowly founded upon "physical" well-being. It takes little account of the wider effects which the presence of a child in the proximity of licensed premises may have upon that child. The substance of the idea of welfare in the early period of its development related more to physical well-being rather than to other aspects.⁹⁰ But given this narrow view of welfare, the decision illustrates in a general sense welfare as an object of legislative policy which was effective in that case, but the facts are indicative of a view of the substance of welfare which is now outdated. The Lord Justice-Clerk in effect acknowledged this defect when he commented that "a Judge has no power to extend the application of an Act of Parliament."⁹¹ Although

88 1911 S.C. (J.) 61 at p.66. 89 1911 S.C. (J.) 61.

90 Chapter 44. 91 1911 S.C. (J.) 61 at p.66.

this is consistent with the decision in that case, the wider implications of the remark reflect a narrower view of the relevance of legislative policy than the English courts appear to have adopted.

8.24 There are two other criminal cases which demonstrate the relevance of legislative policy to interpretation. They deal with procedural issues rather than substantive law.

In H.M. Advocate v Fraser⁹² the panel was charged in the alternative with culpable homicide of his child or with wilful assault contrary to section 1 of the Prevention of Cruelty to Children Act 1894. Section 4 of that Act together with the Schedule made the wife of a panel a competent witness against her husband in respect of the statutory charge. The provisions of the Act said nothing about the wife as a competent witness in relation to a common law charge. The court however was prepared to admit her evidence. The Lord Justice-General⁹³ did not introduce into the statute the limitation for which counsel for the panel was contending;⁹⁴ namely, that the more flexible evidential rule applied only to conduct which would constitute an offence if committed against children under sixteen but not otherwise. His reason was that the Act was a "remedial statute," one of the objects of which was "to facilitate proof of offences committed against young children by their parents".⁹⁵ Hence the statutory provision applied to common law as well as to statutory offences.

92 (1901) 3 Fraser (J.) 67. 93 Lord Balfour.

94 (1901) 3 Fraser (J.) 67 at p.68. 95 Ibid. at p.69.

8.25 Legislation not only creates offences against children but also regulates the situation where children commit offences against others. Welfare of the child may be relevant in interpreting provisions in each set of circumstances but it will play a different role. In H.M. Advocate v Crawford⁹⁶ the accused reached the age of sixteen between the date of the offence and the date of his conviction; and section 102 of the Children Act 1908 prevented a young person from being sentenced to penal servitude for any offence. On the basis of a literal interpretation of the Act the Lord Justice-General⁹⁷ concluded that Crawford had to be treated as an ordinary criminal and not as a young person. Even so:-

"..... I should have been prepared to stretch the Act so as to enable the court to deal with the prisoner as if he had been a 'young person'."⁹⁸

Such a view was obviously in conflict with the literal meaning of the Act. The justification for so 'stretching' the Act would, at least impliedly, have been to satisfy the needs of the offender as well as to safeguard the public interest. Lord Skerrington explained that the purpose of the statute in question was the reformation of youthful offenders: "[Crawford] is, in fact, a youthful offender, although, technically, he does not fall within the definition of the Act of 1908."⁹⁹ The court however did not feel it

96 1918 J.C. 1.

97 Lord Strathclyde.

98 1918 J.C. 1 at p.2. 99 Ibid. at pp. 2 and 3.

necessary to adopt that argument, for the view was taken that the court had power in any event to send the prisoner to a Borstal Institution. It is apparent therefore that the policy of the legislation as conceived by the court was achieved by a proper exercise of the court's power without having to resort to legislative policy to justify their potentially strained interpretation of the legislation. That they would have been prepared to do so indicates significantly the court's view of policy as a relevant aid to interpretation of legislation affecting the welfare of children.

(c) Other Scottish legislation.

8.26 These Scottish criminal cases illustrate a strong judicial preference for the ordinary canons of interpretation. It may be significant that they are criminal cases. If so, the approach may have been influenced by a tacit policy favouring freedom of the individual rather than the welfare of children. There is however evidence which shows an approach to interpretation consistent with the imaginative techniques employed in England. For example, the issue in Stokes v Stokes¹ was whether, in a consistorial cause where access had been awarded to the pursuer (the husband and father), access could also be competently awarded to the pursuer's own parents while he by nature of his absence abroad was unable

1 1965 S.C. 247 to 249 (O.H.); 1965 S.C. 246 (I.H.); reported sub nom. S. v S. 1967 S.C. (H.L.) 46 (H.L.).

to exercise his judicial right of access. Lord Kissen in the Outer House declined the request² but his judgment was reversed³ in the Inner House and the decision of the Inner House was later affirmed in the House of Lords for quite different reasons.⁴ In the Inner House of the Court of Session the argument⁵ turned upon section 14(2) of the Matrimonial Proceedings (Children) Act 1958⁶ which clearly enables custody to be committed to a person other than the parent of the child. There is no specific reference to access.⁷ Both the Lord President and Lord Guthrie proceeded upon a close analysis of section 14(2) and Lord Guthrie was prepared to rely to some extent upon the "intention of the legislature" which he identified as "to secure the welfare of the child."⁸ Although this view is in the circumstances of the case obiter, it nevertheless indicates a Scottish judicial desire to seek out the purpose of a statute dealing with children and to make that purpose effective, if not expressly, at least by ensuring that the decision is not inconsistent with the statutory objective. It follows that access may competently be awarded to a pursuer's own parents in a consistorial action. It is thus possible for persons other than children to be the beneficiaries of the legislation in addition to the children themselves, on the assumption no doubt that this may obliquely be of advantage to the child.

2 1965 S.C. 247 to 249. 3 1965 S.C. 246.

4 S. v S. 1967 S.C. (H.L.) 46: see particularly at p.50 per Lord Reid. The reasoning of the House of Lords is not presently relevant.

5 1965 S.C. 246 at pp. 250 and 251 per Lord Clyde L.P. and at pp. 251 and 252 per Lord Guthrie.

6 6 & 7 Eliz. 2, c.40. 8 1965 S.C. 246 at p.252.

7 Lord Clyde.

8.27 In similar fashion a judicial award in favour of a parent may be of advantage not only to the parent but also to the child. In Miller v Miller⁹ a wife sued her husband in the Sheriff Court for custody of her children and for aliment for them. It was argued before the sheriff-substitute¹⁰ that the Guardianship of Infants Act 1886¹¹ enabled the sheriff to deal only with custody and that the common law jurisdiction of the sheriff was no wider. The judge concluded that on the merits of the action the wife should be awarded custody and that it would be anomalous for an innocent wife not to receive aliment for the children. In the absence of a specific statutory power, he argued:-

"No doubt the statute was chiefly aimed to provide for the custody of the children, and in the upper classes a wife who has got the custody of her pupil children may frequently have enough money of her own to provide for their support. But the Act was not passed to provide for such mothers alone. And if it were to be held that the terms of the statute were not sufficient to justify a court in ordering a husband to pay aliment for his children, the Act would be practically a dead letter¹² as regards women of the working classes."

A rather unique view of legislative policy therefore enabled the judge to extend the narrow statutory powers of the court in favour of both the mother and through her the children. If legislative policy had been irrelevant, a different decision may have been reached.

9 (1889) 5 Sh. Ct. Rep. 289. 10 Sheriff-substitute Lees.

11 49 & 50 Vict., c.27.

12 (1889) 5 Sh. Ct. Rep. 289 at p. 291.

8.28 Legislative policy is merely an aspect of public policy which has met with Parliamentary approval and which has subsequently been encapsulated in statutory form. There is in principle no difference between these two aspects of policy for present purposes, although the sources of public policy may be even more uncertain than those of legislative policy. In J S - Petitioner¹³ the sheriff-substitute at Glasgow¹⁴ was invited to make an adoption order in favour of a married man living with a married woman (not his wife) in respect of their illegitimate child. If the parties had been divorced and subsequently had inter-married, there would have been no difficulty but the sheriff-substitute expressed the view:-

"..... public policy prevents the adoption in the present circumstances and the Acts intend to maintain this policy. The clearest indication of this is that otherwise they would have authorised the joint adoption by persons who were not married, whereas such an adoption is explicitly prohibited by section 1(3) of the principal Act.¹⁵"¹⁶

There being no judicial discretion, an adoption order was refused.

8.29 It has already been recognised that the policy of an Act affecting children may have nothing to do with the protection or promotion of the welfare of children.¹⁷ The

13 1950 S.L.T. (Sh.Ct.) 3. 14 Sheriff-substitute S.G. Kermack.

15 Adoption of Children (Scotland) Act 1930 (20 & 21 Geo. 5, c.37).

16 JS - Petitioner 1950 S.L.T. (Sh.Ct.) 3 at pp. 3 and 4.

17 Paras. 7.3 and 7.13.

welfare of the child may be inconsistent with the rights, for example, of the child's parents. The legislation may often seek to achieve an appropriate balance between conflicting objectives and statutes may thus confer rights upon the parents of children whose welfare the statute is also designed to safeguard, either for the benefit of the parents or obliquely for the advantage of the child. In Page v General Board of Control for Scotland¹⁸ the mother of a mentally defective child, whose detention had been continued administratively, had not received intimation of the continuance of the order as required by section 12 of the Mental Deficiency and Lunacy (Scotland) Act 1913.¹⁹ The issue was entirely one of statutory construction. Section 12 appeared to Lord Moncrieff to be ambiguous:-

"In such a case [of ambiguity] it becomes permissible to have regard to the general scheme and purport of the Act, and to the function of the clause in dispute in relation to that purport and scheme. I accordingly approach the problem of construction under the guidance of a recognition that this Act is framed to operate by interfering between parent and child, and the function of the clause is to regulate the requirements of intimation to the parent as a probable opposer of such an interference."²⁰

The whole scheme of the Act²¹ laid emphasis upon the parental

18 1939 S.C. 182.

19 3 & 4 Geo. 5, c.38.

20 1939 S.C. 182 at p. 186.

21 Particularly section 7.

interest in matters of enforced detention in addition to the salutary effect for the child. Intimation to the parent was thus necessary and the continuance of detention consequently unlawful. According to Lord Moncrieff, however, such an approach was permissible only in the event of ambiguity; no such limiting factor appears to have been introduced in any of the other cases analysed. The absence of such a requirement in the other cases emphasises the significance of the comment by Lord Moncrieff. The use of policy as an aid to the interpretation of legislation affecting the welfare of children appears to be unrestricted and hence more potentially dynamic than otherwise.

8.30 Even in that unrestricted manner, the use of policy as an aid to statutory interpretation is fundamentally an exception. By far the majority of judgments construing legislation affecting children have no need of it. Notwithstanding that ambiguity is not a requirement, it is unlikely that policy will override an anti-welfare interpretation founded upon the clear literal meaning of the relevant words and phrases. In McD. and McD., Petitioners²² a husband and wife applied to adopt an illegitimate girl of twelve who had been in their de facto custody since she was ten days old. The child was unaware that the petitioners were not her parents. No consent to the adoption on the part of the child was lodged,²³ although, somewhat anomalous, a request to

22 (1943) 65 Sh. Ct. Rep. 42.

23 Adoption of Children (Scotland) Act 1930, s.2(3).

dispense with such consent was made. Sheriff-substitute Duncan took the view that the consent of a girl of twelve years was necessary but could not be dispensed with;²⁴ an adoption order could not therefore be made. Reference was made to the policy of the legislation but it failed to have any effect. A literal approach was adopted:-

"..... the general purpose of the statute is remedial and ... no unnecessary barriers ought to be erected to impede desirable adoptions. One can well envisage circumstances - and they may exist here - in which possible adopters would regard the price of revelation to a child as too high a price to pay for its adoption. However that may be, the circumstance is irrelevant if the statute makes no provision for it."²⁵

The dilemma facing the court may be appreciated. The desirable purpose of not refusing beneficial adoptions is in conflict with the equally reasonable requirement of the consent of a minor. Where one item of policy is unambiguously crystallised in statutory form, it is scarcely practical, even if permissible, to rely upon a more general policy not couched in specific terms which is in conflict with the former policy. In such a situation the normal rule of interpretation of giving effect to the literal meaning

24 A power of dispensation was subsequently conferred by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1966 (1966 c.19), s.4: see also Children Act 1975, s.8(6).

25 (1948) 65 Sh. Ct. Rep. 42 at p.44.

would apply to exclude matters of broad policy. Hence the use of policy as an aid to interpretation remains an exception justified ultimately by the significance attributed to the welfare of the child.

Section 5 - Conclusion.

8.31 This analysis suggests that, when faced with interpreting a statute regulating the position of children, the courts, both in England and Scotland, have regard to the policy of the legislation in certain circumstances. The use of policy in this way is fundamentally an exception to the general rule which applies to children's as to other legislation; namely, that the words used by the legislature are prima facie indicative of Parliamentary intention. Policy, however, would appear to be of potentially wider scope in this context than in others, for the courts have not limited the relevance of policy to cases of ambiguity.²⁶ This is not to say that an interpretation founded upon policy considerations is permissible when it is contrary to the meaning of the statute. Nevertheless the circumstances in which the aid of policy may be invoked have not been precisely formulated. To that extent the position is unsatisfactory.

8.32 The question may be posed why is it desirable or even necessary to have regard to legislative policy in

²⁶ Para. 8.29.

this type of legislation. There is no judicial answer. The courts have merely made assertions about policy and used policy in aid of statutory interpretation. They have not sought to justify it. The answer however is perhaps implied in the several judicial pronouncements. The nature of children's legislation and the precarious position of children within the law generally indicate and require privileged treatment. The courts have accepted, without question or justification, this exceptional privilege conferred upon children as a type of grundnorm. If this is the correct view, rationalisation lies in the area of policy, not a matter for discussion by the courts. It is not therefore surprising that the courts take this policy of privilege for granted. It is merely a practical demonstration of the fulfilment of legislative policy that it should play an important role in such a mundane but vital area as interpretation.

8.33 It could be suggested that such a policy-inspired view of interpretation might create an opportunity for judicial legislation. Parliament, allegedly, might be practically impotent in the face of such a discretionary approach.²⁷ It is however suggested that there is no evidence of any judicial abuse of the procedure. The courts tend to be somewhat conservative and normally apply the

27 Parliament has conferred wide discretionary powers upon the courts in many different contexts. The "restrictive" factor is often welfare.

strict rules of interpretation. Policy would appear to be invoked only when the court is satisfied what is the content of the relevant policy. It must be emphasised that the courts do not apply legislative policy; they merely have regard to such policy in the interpretation of the relevant Act. Their difficulties lie less in handling policy and more in ascertaining the content of the policy. Notoriously statutes implement but do not state policy, except in the most general and normally unhelpful fashion. If legislation is to continue to be drafted in current form and if policy is to remain as a catalyst to interpretation, it would be helpful if the purpose and objective of the legislation were to be disclosed on the face of the legislation so as to be openly available for interpretational purposes. This may be tantamount to suggesting a new form of legislation. But it would do little more than acknowledge a current and apparently acceptable judicial practice and make interpretation a little easier for the judges.

CHAPTER 9

THE PROTECTION OF CHILDREN AS POLICY

Section 1 - Introduction

9.1 The preceding chapter established the relevance of policy to interpretation. Logically the next stage is to ascertain the contents of the policies admitted as an aid to judicial interpretation. Policy in relation to the welfare of children is expressed in many ways.¹ There are many other more specific instances of judicial descriptions of legislative policy affecting children. One such common description of legislative policy refers to the protection of children, to which passing reference has already been made. Protection of children as such is an important policy objective and deserves closer analysis. Protection of children has a clear physical connotation. The concept of protection also relates to the welfare and interests of the child. In that context it must be distinguished from promotion of the child's welfare. The former is negative, the latter positive: a distinction vital to this analysis.

Section 2 - England.

9.2 The decisions in three English cases,² already noted

1 E.g. as legislative policy, intention, purpose, object, objective, aim, etc.

2 Kirkwood v Kirkwood [1970] 2 AllE.R. 161; Snow v Snow [1971] 3 AllE.R. 833; W(RJ) v W(SJ) [1971] 3 AllE.R. 303.

in the general context of legislative policy,³ were founded upon the view that, as certain English matrimonial statutes⁴ were intended to protect children, they were required to be construed accordingly. There was no suggestion in these cases that the policy of child protection was relevant only in the event of ambiguity. The policy operates therefore not merely as an aid to interpretation in case of difficulty but more importantly as the premise upon which the whole interpretative approach to the statute is founded.

9.3 This philosophy is not restricted to matrimonial legislation. The preamble to the Children Act 1958,⁵ the significance of which has already been considered,⁶ refers to the "protection of children living away from their parents." This was used in Surrey County Council v Battersby⁷ in considering whether the statutory criteria of a "foster parent" were satisfied. The policy of the protection of the child was particularised by Sachs J. in the following words:-

"The main mischief aimed at was to avoid such children being for long periods in charge of persons who might be unsuitable to have their care or being in accommodation that was unsuitable."⁸

In this case the policy of protection was used to justify one

3 Paras. 8.11 and 8.12.

4 Matrimonial Proceedings (Magistrates' Courts) Act 1960 (8 & 9 Eliz. 2, c.48); Matrimonial Proceedings and Property Act 1970 (1970 c.45).

5 6 & 7 Eliz. 2, c.65. 6 Para. 7.11.

7 [1965] 1 AllE.R. 273. 8 Ibid. at p.277.

of two constructions attributable to the word "undertaken" in section 2(1) of the Act. There was no suggestion that such an approach would necessarily be restricted to resolving an ambiguity, although it cannot be denied that that is what happened in that case.

9.4 The solution may not always be so simple. How, for example, do provisions in a statute which are intended to protect children relate to other statutory provisions which indicate an alternative but not necessarily inconsistent objective? In R. v Coleshill Justices: ex parte Davies and another⁹ two "young persons" were committed for trial along with five adults under the procedure prescribed by section 1 of the Criminal Justice Act 1967.¹⁰ That provision permits in certain circumstances committal for trial without consideration of the evidence. Section 6(1) of the Children and Young Persons Act 1969¹¹ requires a "young person" to be committed for trial in certain prescribed circumstances but only if the magistrates' court is satisfied that there is sufficient evidence to do so. The provisions of the 1969 Act are undoubtedly protective in character and the Queen's Bench Divisional Court concluded that the 1967 Act could not apply "to the committal for trial of a young person to whom section 6(1) of the 1969 Act applies."¹² This reasoning is

9 [1971] 3 AllE.R. 929. 10 1967 c.80.

11 1969 c.54.

12 [1971] 3 AllE.R. 929 at p.931 per Bridge J.

analogous to the maxim generalalia specialibus non derogant.¹³

This case may reasonably be regarded as a special instance of the approach indicated by that maxim with particular reference to the policy of child protection. That policy will thus take precedence over any other more general policy which may be relevant.

Section 3 - Scotland.

9.5 These English cases illustrate protection of children as a policy factor in interpretation. There are fewer Scottish examples, but the Scottish courts in two cases¹⁴ have analysed protection as legislative policy in considerable depth. In EO¹⁵ a widowed father of two small girls and his sister were living together in "family" with the children. The father proposed to remarry and his sister applied to adopt the two girls. An adoption was regarded as "consistent with their best welfare."¹⁶ The problem centred round the requirement in section 2(6)(a) of the Adoption Act 1950¹⁷ that, unless the infant had been continuously in the care and possession of the applicant for at least three

13 Maxwell, p.196. The maxim does not apply strictly in this case, since the general provision precedes the special provision.

14 E.O. - Petitioner 1951 S.L.T. (Sh. Ct.) 11; A., Petitioners 1958 S.L.T. (Sh. Ct.) 61.

15 1951 S.L.T. (Sh. Ct.) 11.

16 1951 S.L.T. (Sh. Ct.) 11 at p.11 per Sheriff-substitute Hamilton.

17 14 Geo. 6, c.26.

consecutive months, an adoption order could not be made.¹⁸
 It was conceded that the sister had been looking after the children since the mother's death and that she was living with the children and their father.¹⁹ The judge did not²⁰ think that these circumstances justified the proposition that the children were living with their aunt. There is thus a significant distinction between "living with" and "being in the care and possession of."²¹ He concluded that the children were in the possession and control of the father; the statutory requirement in section 2(6)(a) had not been met. Thus an adoption order could not be made, however much it may have been beneficial to the children.

9.6 The justification for this interpretation of section 2(6)(a) of the 1950 Act lies in the judge's view of the policy of child protection. It is worthwhile quoting him in full:-

18 This requirement and its recent substitute are analysed in chapter 24.

19 1951 S.L.T. (Sh. Ct.) 11 at p.12.

20 Sheriff-substitute Hamilton.

21 Which may be similar to the distinction between that requirement and the recently substituted requirement of "having his home with:" Children Act 1975 (1975c. 72), s.9(1).

"In my view it is a peremptory provision and a condition precedent to an order being made. The agent for the petitioner submitted that the provision went no further than meaning that the children had been living with the proposed adopter, and that if the Court was satisfied the adopter was suitable that was enough. I think not. The whole Act is for the protection of children and this provision very much so. While the children may be - and I think are - perfectly happy living as they are, it does not follow they would necessarily be so if removed from their father and living with their aunt alone. This provision in my view would protect a child who was not contented and progressing with the adopter."²²

That leaves no doubt why the judge reached his decision. Nevertheless it may be possible to question the sweeping generality of the remark that "the whole Act is for the protection of children" on the ground that adoption legislation may also be intended to promote, not merely to protect, the welfare of children²³ and to safeguard certain parental rights and interests.²⁴ It would however be difficult to deny that the provision in question was designed to protect the child from an adverse adoption.

22 1951 S.L.T. (Sh. Ct.) 11 at p. 12 per Sheriff-substitute Hamilton.

23 Para. 7.9.

24 Idem.

9.7 The policy of protection was used in that sense by the judge to reject one interpretation of the provision in preference to another, so as to prevent an unfortunate adoption from taking place.²⁵ The result is a rather narrow and restrictive view of section 2(6)(a) of the 1950 Act. If a wider view of that provision had been taken, for example, to promote welfare generally rather than to protect the child, a different interpretation may well have resulted. Thus the kernel of this aspect of the decision, the judicial formulation of legislative policy, reflects essentially one person's view of what Parliament was in a very broad sense trying to do when the Act was passed. The judge gave no reason for his view of the policy of the Act; indeed to do so would be a major and detailed exercise.²⁶ The refusal to grant an adoption order therefore turned on an unsupported statement of extremely subjective quality. This is not to say that the statement or the decision was wrong; it is in the present context an acknowledgement of its nature.

9.8 The issue in A²⁷ was the same as in EO,²⁸ namely whether the requirements of section 2(6)(a) of the 1950 Act were satisfied. The facts were somewhat different. A husband and wife applied to adopt the illegitimate child of the wife born to her before the marriage to the other applicant. It appeared that the husband was, and had for

25 This is an example of the distinction between the protection and promotion of welfare. Protection is negative in that an adoption may be prevented; promotion is positive in that an adoption may be brought about.

26 One, given current rules, likely to be beyond the technical competence of a court. 27 1953 S.L.T.(Sh.Ct.) 61.

28 1951 S.L.T. (Sh. Ct.) 11.

some time been, serving as a regular soldier, spending leaves with his wife and her child in her parent's home. He had never, however, been able to live for three consecutive months with them.²⁹ The judge conceded that an adoption order could not be granted if section 2(6)(a) were to be applied literally, for the child had clearly not been continuously in the care and possession of the husband for three consecutive months.³¹ The sheriff-substitute considered two Scottish authorities on the effect on care and possession of an interruption during the three month period.³² Neither proved directly helpful. He felt justified in adopting a flexible attitude and granted the adoption order.³³ In doing so he made various observations on the policy of the Adoption Act 1950 which repay analysis.

2.9 He argued that, the various reports being highly favourable to the adoption, "the protective intention of the section [had been] in fact fulfilled."³⁴ It was "protective" in the sense that "the three month period [was] a probationary period to enable it to be seen whether the child [would] settle down with, and be properly looked after by, the adoptive parents."³⁵ To this extent the judge's view of the policy implicit in section 2(6)(a) of the 1950 Act

29 1958 S.L.T. (Sh. Ct.) 61 at p.61.

30 Sheriff-substitute Prain. 31 1958 S.L.T. (Sh.Ct.) 61 at p.61.

32 S. Petitioner 1953 S.L.T. 220; Mr. and Mrs A., Petitioners 1953 S.L.T. (Sh. Ct.) 45.

33 1958 S.L.T. (Sh. Ct.) 61 at p.61. As to "flexibility," see chapter 10. 34 1958 S.L.T. (Sh. Ct.) 61 at p.62.

35 Ibid. at p.61. Where a child and his mother were to continue living together, as here, that according to the judge reduced the attention to be devoted to these considerations.

is the same as that of Sheriff-substitute Hamilton in EO,³⁶ but Sheriff-substitute Prain added a further comment which went far beyond anything said by Sheriff-substitute Hamilton:-

"The disturbing feature of this case is that the statutory provisions should cause doubt and hesitation in the granting of an order which is so manifestly for the benefit and welfare of this child At the moment there seems to be some confusion between the necessary legislation for the protection of children generally and the aims of the restrictions placed on the granting of adoption orders. The latter are presumably intended as protective provisions but, in fact, they operate in the other direction. To be protective those restrictions would require to apply to all actual adoptions and not only to the granting of adoption orders. At present the restrictions do nothing to prevent actual adoptions, they do nothing to protect children from unsuitable adoptions; all that they do is to restrict the number of children eligible for the benefits of an adoption order and to serve to deprive children of important and valuable rights."³⁷

9.10 The problem clearly is what purpose certain provisions of the Act are intended to achieve. The judge's comments indicate how difficult it may be to identify legislative policy and perhaps even how dangerous it may be to use policy in construing Acts of Parliament. But the

36 1951 S.L.T. (Sh. Ct.) 11.

37 1953 S.L.T. (Sh. Ct.) 61 at p.62.

overall policy of the legislation almost forces the use of that very policy to assist interpretation. It is not moreover absolutely clear what Sheriff-substitute Prain's comments mean. He talked in terms of "protection".

"Protection of children" involves safeguarding or securing the welfare of children: it does not normally mean the promotion of the welfare of children. In that sense it is a static rather than a dynamic concept.

9.11 Section 2(6)(a) of the 1959 Act was probably intended to ensure that an adoption order undesirable from the child's point of view could not be made. This is very different from arguing that a desirable adoption order should be made so as to benefit the child. The questionable element in Sheriff-substitute Prain's opinion is the comment that the restrictions placed upon the granting of adoption orders do not operate to protect the child. In his view "in fact they operate in the other direction."³⁸ These are puzzling comments. It is not clear against what the children are to be protected. The general legislation to which he referred may include the provisions which protect children from physical abuse.³⁹ The restrictions on the granting of adoption orders are probably concerned to protect the child from undesirable adoption orders. Sheriff-substitute Prain seems to have treated in the same way these distinctive aspects of protection.

38 Para. 9.9; n.40.

39 E.g. Adoption Act 1958 (7 & 8 Eliz., 2, c.5) s.43 as amended by Children Act 1975, s.108 and Sched. 4, Part XI; Adoption Act 1976 (1976 c.36), s.34.

9.12 This criticism may be further justified by reference to the last two sentences of the extract of the judge's opinion. He suggested that the statutory restrictions should apply to "all actual adoptions." The reference in his judgment to the restrictions doing nothing "to prevent actual adoptions" is also puzzling. If section 2(6)(a) were to be interpreted literally, it would, as Sheriff-substitute Prain suggested, almost certainly limit the number of adoption orders made, by "protecting" children from "suitable" adoptions without assisting the granting of orders in cases where an order would be beneficial. That would no doubt be undesirable as a matter of policy. By "actual adoption" he probably meant the de facto assumption of a parental relationship by non-parents. The restrictions in the legislation were directed only to the situation where it was proposed to apply for an adoption order. They had no relevance to "actual adoptions" in that sense. The judge appears to have misled himself about the policy of protection contemplated by the legislation. His dicta were probably not necessary for his actual decision. The case demonstrates the problems which may arise if the policy of the legislation is misconceived.

Section 4 - Conclusion.

9.13 The general position, however, seems clear. The courts in Scotland and England have evolved the concept of the protection of children as an item of policy propounded by Parliament and have used it as an aid to interpretation. The concept has been neither fully described nor analysed

by the courts. It is an idea sufficiently wide and imprecise to be susceptible of various meanings, thus enabling it to be used by the courts to justify several different lines of approach to interpretation. Perhaps the legislation affecting children requires such flexibility or perhaps, as Sheriff-substitute Prain hinted,⁴⁰ even more freedom of manoeuvre. The courts are afforded considerable discretion in terms of current legislation: an additional discretion at the point of interpretation may arguably complement that type of Parliamentary mandate.

9.14 Reliance upon protection as a policy is not a new phenomenon; it would appear nevertheless to be finding increasing judicial support. Perhaps the moment is coming when it should be more fully analysed by the courts to enable its use to be more easily predicted. Perhaps it should also be more carefully distinguished from other equally valid policies pursued by the legislation.⁴¹ For it seems clear that it is not impossible for judges to become slightly confused when attempting to identify the relevant policy objectives.⁴² Current practice suggests that the search for the correct policy is too subjective. The use of policy should therefore be clarified by some new mechanism or abandoned as a device to construe children's legislation.

40 A., Petitioners 1958 S.L.T. (Sh. Ct.) 61 at p.62: para. 9.9.

41 The distinction between protection and promotion has already been suggested.

42 E.g. Sheriff-substitute Prain in A., Petitioners 1958 S.L.T. (Sh. Ct.) 61.

CHAPTER 10

WELFARE AND THE TECHNIQUES OF INTERPRETATION.

Section 1 - Introduction.

10.1 The consequence of admitting policy, particularly the policy of protection, as an aid to statutory interpretation is simply the avoidance of absolute reliance upon the literal approach. There are many, well-established ways of achieving that result.¹ This analysis is concerned particularly with those relevant to children's legislation and founded ultimately upon the welfare of children as their justification. The final technique for consideration may be found in conjunction with the use of policy or independently of it. There is no single established name for this technique; it appears under differing descriptions; its fundamental quality is flexibility. It is thus less an aid to interpretation and more a state of mind in which a judge comes to interpret the relevant statute. In that sense it is to a very large degree dynamic. Its subjectivity places it almost beyond legal justification; as in the case of policy,² it operates as a type of grundnorm acceptable to the judge.

Section 2 - The liberal approach: England.

10.2 This significant and well-precedented technique of interpretation in relation to children's legislation amounts in practice to inherent flexibility. Emphasis is placed not on the object of the legislation, as in the case of the

1 Maxwell, particularly chapters 2, 4 and 11. 2 Chapter 9.

policy of protection of children, but on the way in which the fabric of the statute has been woven. In Ridley v Ridley,³ for example, the court was asked to exercise its powers under section 23 of the Matrimonial Causes Act 1950⁴ to make an order for periodical payments in respect of both the wife and the children. The husband had been proved to have been guilty of wilful neglect to provide reasonable maintenance for his wife but not for the children. Earnard J. felt convinced that he had to regard section 23 "broadly" as it would be "more convenient"⁵ to provide for payments for the wife and for the children together. He did not explain his reasoning; he reached his decision by instinct. He adopted a broad rather than a narrow interpretation and thereby gave effect to his feeling for what Parliament intended.

10.3 A similar preference for a "wide" interpretation was exhibited by the House of Lords in Galloway v Galloway⁶ for the purposes of section 26(1) of the same 1950 Act and by Lane J. in Newman v Newman⁷ in construing "relevant child" within the meaning of section 46(2) of the Matrimonial Causes Act 1965.⁸ In concluding that a child may be a "relevant child" in a second divorce suit to which only one of the parents is a party, Lane J. regarded it as important "that the court should be able to exercise its powers not only under sections 33 and 34, but also under sections 36 and

3 [1953] P.150.

4 14 Geo. 6, c.25.

5 [1953] P.150 at p.152. 6 [1955] 3 AllE.R. 429.

7 [1970] 3 AllE.R. 529. 8 1965 c.72.

and 37"⁹ This certainly indicates a wide or liberal approach to interpretation.

10.4 There are examples also in the contexts of custody and adoption. In Re W(JC) (An infant)¹⁰ the Court of Appeal interpreted the Guardianship of Infants Acts fairly broadly in holding that custody was a "divisible" concept in the sense that custody could be awarded to one parent and care and control to the other.¹¹ When construing section 3(1) of the Adoption Act 1958 Buckley J. in Re B(GA) (an Infant)¹² followed earlier Scottish authorities¹³ and acknowledged that "the section cannot reasonably be construed in its most strictly literal terms."¹⁴

10.5 Examples of similar interpretative techniques may be found in relation to the Children and Young Persons Acts. The circumstances in R. v Whilbey¹⁵ were somewhat unusual. A father present in court to seek the custody of three of his children walked out of the building, leaving his other five children behind, when he was informed that the application for custody could not be heard on that day. He was charged with abandoning them and causing them unnecessary suffering contrary to section 1 of the Children and Young Persons Act

9 [1970] 3 AllE.R. 529 at p.533. 10 [1963] 3 AllE.R. 459.

11 See also ReN (Minors) (1973) 4 Family Law 93.

12 [1963] 3 AllE.R. 125.

13 Including A, Petitioners 1958 S.L.T. (Sh. Ct.) 61 discussed in paras. 9.8 to 9.12.

14 [1963] 3 AllE.R. 125 at p.127. 15 [1938] 3 AllE.R. 777.

1933.¹⁶ The heading of Part I of that Act indicated the nature of the suffering contemplated by the legislature, namely "prevention of cruelty and exposure to moral and physical danger." Branson J.'s approach was not "to limit the ambit of that language in a proper case."¹⁷ This clearly was an exhortation to himself of flexibility. It was not however necessary, for he did not accept that in the unusual circumstances of that case even the most literal view of section 1 of the 1933 Act could sustain a conviction. The finding of guilty by the court of first instance was thus reversed on appeal.

10.6 In R. v Hayles¹⁸ the accused was also charged with a breach of section 1 of the Children and Young Persons Act 1933. His young son died after falling down the stairs and having been put to bed without medical attention. The charge under section 1 specified "wilful ill-treatment" of the child and the presiding judge directed the jury that the father's "neglect" to give medical attention was sufficient to sustain the charge. Section 1, of course, prescribes different examples of behaviour¹⁹ as amounting to the criminal offence in question. The appellant argued that the judicial reference to "neglect" was not consistent with the charge of "ill-treatment." This was however rejected. The various elements of section 1 were not separate offences and the whole provision was to be regarded as descriptive of one general offence against

16 22 & 23 Geo. 5, c.46.

17 [1938] 3 AllE.R. 777 at p.778.

18 [1969] 1 AllE.R. 34.

19 I.e. assault, ill-treatment, neglect, abandonment or exposure.

children. Widgery L.J. summed up the approach of the Court of Appeal thus:-

"That [to create separate offences under section 1] would be a technical complication which would be highly undesirable, and one from which this court finds it possible to escape²⁰"

He did not explain why such a "technical complication" would be "highly undesirable". The reason could be inconsistency with the object of the provision, namely the protection of the welfare of the child. This case may be a further example, actually comprising the ratio decidendi of the decision, of a "non-technical" approach to the interpretation of the legislation.

Section 3 - The liberal approach: Scotland.

10.8 The oldest Scottish case of present concern does not apply to children. It deals with the liability to care for an adult mental defective under the Mental Deficiency and Lunacy (Scotland) Act 1913.²¹ This does not matter, for the issue is the same, provided the provision aims to protect or promote the welfare of a person legally incapax. A statutory duty was placed upon a parish council to care for a mental defective "abandoned" within the meaning of the 1913 Act. The issue in New Monkland Parish Council v Erskine²²

²⁰ [1969] 1 All E.R. 34 at p.37. ²¹ 3 & 4 Geo. 5, c.38.

²² 1926 S.C. 835.

was whether a mental defective had been so abandoned. Lord Sands in the Inner House of the Court of Session crystallised the question concisely:-

"She is a defective, her father declines to receive her into his house, the persons who at present have the care of her decline to keep her longer unless compelled to do so. In these circumstances, having in mind the humane objects of the Act, which point to a liberal and not to a Jesuitical construction, I am of opinion that this defective answers the description of a defective who is 'abandoned'. I am not disposed, in construing this statute, to be troubled by niceties or subtleties, such as the contention that the woman cannot be said to be abandoned because at the moment she is not actually turned out of doors."²³

There can be little doubt therefore that, given the appropriate statutory objective, the Court of Session is prepared, if indeed not bound, to disregard the strict rules of interpretation in order to give effect to that objective. There would appear to be no need to indicate any ambiguity in the phraseology to introduce the liberal approach. The identification of the appropriate objective is the justification for the approach. There would in this sense seem to be complete consistency between the approaches of the English and Scottish courts.

10.9 There are Scottish examples derived from the parent and child relationship. Stokes v Stokes,²⁴ it will be recalled,²⁵ dealt with the question whether in a consistorial context access to a child could be awarded to persons other than the

²³ Ibid. at p. 841 ²⁴ 1965 S.C. 246. ²⁵ Para. 8.26.

parents of the child. Although the case went to the House of Lords,²⁶ where the decision of the Inner House was confirmed for reasons other than those given by the judges in the lower court, Lord Guthrie clearly and Lord Clyde L.P. by implication considered it competent to adopt a wide view of the legislation²⁷ if it would give effect to the statutory objective.²⁸²⁹

10.10 In Huddart v Huddart³⁰ the court was also invited to interpret section 14(2) of the Matrimonial Proceedings (Children) Act 1958. The issue was different from that in Stokes v Stokes;³¹ namely, was it competent for the court to regulate access to a child in a consistorial context without dealing with custody? In an undefended divorce action the pursuer husband averred that the best interests of the children required that they should remain with their mother who did not however ask formally for custody. The husband nevertheless asked for access. Lord Wheatley accepted that it was competent to award access without regulating custody.³² In his view the question turned upon the meaning of "legal custody" in section 14(2) of the 1958 Act. There were two possible constructions. An element of ambiguity was thus

26 1967 S.C. (H.L.) 46.

27 1965 S.C. 246 at pp. 250 to 252 per Lord Clyde L.P. and Lords Carmont and Guthrie.

28 Matrimonial Proceedings (Children) Act 1958 (6 & 7 Eliz. 2, c.40), s. 14(2).

29 To secure the welfare of the child: see 1965 S.C. 246 at p. 252 per Lord Guthrie.

30 1960 S.C. 300. 31 1965 S.C. 246.

32 1960 S.C. 300 at pp. 300 and 301.

introduced.³³ Lord Wheatley preferred the "wider" sense, simply because "it was the expressed intention of Parliament in this Act, benevolently framed in the interests of children!"³⁴ A liberal approach therefore is quite within the competence of the Court of Session in modern circumstances if it is in line with the object of the Act.

10.11 Reference should be made to H and H, Petitioners.³⁵ The judgment of Sheriff-substitute Kermack is typical of that judge as a penetrating analysis of a legal concept, here adoption, as a social institution. Such an approach is rare. He was faced with an application by members of the Jewish community for adoption of a child who was the illegitimate child of a Christian. The difficulties facing a non-Jewish child growing up in a Jewish community were sharply drawn to the attention of the court but the Sheriff-substitute approached the question from the point of view of the best interests of the child.³⁶ The broad background was sketched in with the following words:-

"It is perhaps necessary to keep in view that adoption, although first legalised by the Act of 1930, was a social institution in Britain of possibly immemorial origin, a fact of which, I think, the legislation enacted shews cognisance. It is therefore advisable to tread warily in imposing too strict limitations on it by judicial action."³⁷

33 Not, as already established, a precondition of a flexible approach. 34 1960 S.C. 300 at p.301.

35 1949 S.L.T. (Sh. Ct.) 68.

36 Information provided by the Director of Welfare, Glasgow, who was the curator ad litem and also by a leading rabbi: see 1949 S.L.T. (Sh. Ct.) 68 at p. 68.

37 1949 S.L.T. (Sh. Ct.) 68 at p. 68. 38 Idem.

The social implications of a decision on an adoption application were thus recognised together with the corollary that a strict judicial approach is hardly desirable. The judgment therefore exhibits the flexibility of approach appropriate in dealing with such legislation.

Section 4 - Conclusion.

10.12 These various instances, both English and Scottish, demonstrate that legislation affecting children, whatever its objective, attracts an approach which is essentially at variance with the basic norm of statutory interpretation that words are to receive their literal meaning except in circumstances carefully circumscribed by law. It is probably sufficient to describe this approach simply as one of flexibility. It reveals itself in several different ways: the interpretation may be "not technical"; the court may wish to be unrestricted or not limited in its approach; a "wide" view may be taken of the legislation; even a particularly narrow view may conduce to the object of the legislation. This approach has not been subject to close judicial scrutiny nor have the courts postulated any conditions for its exercise. Discretion is its fundamental quality. Whatever its classification, this flexibility is exceptional but significant within the context of legislation affecting children.

CHAPTER 11THE 1933 AND 1937 ACTS OFFENCESSection 1 - Introduction

11.1 The ways in which the legislature has intervened directly to protect the welfare of children by prescribing objective standards have been considered in general static terms.¹ Some are enforceable by civil proceedings; most are straightforward criminal prohibitions. The common element is simply that a certain standard of behaviour is set for certain persons in their relationship with children. This standard is prescribed objectively so that the welfare of the child in the widest sense may be protected. The criminal sanction operates retrospectively in the individual case; the civil sanctions also operate retrospectively but with different consequences. Thus the welfare of the individual child may have already been prejudiced by the time that a successful, or for that matter an unsuccessful, criminal prosecution has been brought. The criminal sanction will effectively protect the welfare of children and of the individual child only if it succeeds in its objective of deterrence. Other approaches, on the other hand, operate prospectively not only in protecting but also in promoting the welfare of children. They are considered later.

1 Chapter 3.

11.2 In the case of criminal sanctions, where the legislation succinctly and unambiguously describes the conduct which forms the foundation of the offence, the aspect of welfare protected by the offence will be clear. Legal difficulties will relate to establishing the facts² or concern the application of the law to the established facts. The dearth of cases decided in the higher courts in England and Scotland suggests that this is so. In any case the solution of any problems of interpretation which arise may be assisted by the special rules of interpretation applicable to legislation affecting children. Some of the provisions are couched in fairly general terms which by their nature are open to differing interpretations. Moreover the ordinary rules of law apply to these statutory offences except in relation to the substance of the offence; for example, the time limit of six months within which a summary complaint must be brought in Scotland.³

-
- 2 Oakey v Jackson [1914] 1 K.B. 216 at p. 220 per Darling J. who said: "The question [of wilful neglect] is one of fact to be decided in each case on the evidence;" Liverpool Society for the Prevention of Cruelty to Children v Jones [1914] 3 K.B. 813 at p.816 per Lord Coleridge J. on the question of custody; Motion v McFall (1899) 1 Fraser (J) 85 at p.86 per Sir J.H.A. Macdonald L.J.-C. who held that desertion for the purposes of the Poor Law Amendment (Scotland) Act 1845 (8 & 9 Vict., c.83), s.80 was a question of fact.
- 3 E.g. Farquharson v Gordon (1894) 2 S.L.T. 63 applying the Summary Procedure (Scotland) Act 1864 (27 & 28 Vict., c.53), s.24 to a charge under the Prevention of Cruelty to Children Act 1889 (52 & 53 Vict., c.44), s.1.

Section 2 - The general approach.

(a) The historical background.

11.3 One of the most important offences designed to protect children is created by section 1(1) of the Children and Young Persons Act 1933⁴ for England and section 12(1) of the Children and Young Persons (Scotland) Act 1937⁵ for Scotland. It is so important that quotation in full is justified:-

"If any person who has attained the age of sixteen years and has custody, charge, or care of any child or young person under that age, wilfully assaults, ill-treats, neglects, abandons or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanour [in Scotland "offence"]..."

Subsection 2(a) treats certain behaviour as neglect; for example, by failing "to provide adequate food, clothing, medical aid or lodging." Subsection 2(b) equates suffocation by overlying in bed under the influence of drink with statutory neglect. The types of conduct forming the basis of a prosecution under these provisions cover a wide range of imaginable human behaviour; indeed the circumstances of

⁴ 23 & 24 Geo. 5, c.12.

⁵ 1 Edw. 8 & 1 Geo. 6, c.37.

some cases are quite horrific. In general, two issues have arisen for determination by the courts. To what persons do the provisions apply? What precise conduct is regarded as criminal? On the face of it the enactments contain a series of conceptually unrelated offences. Some involve acts of commission, others acts of omission. The common factor is the effect on welfare of the child. The courts have on the whole adopted a cohesive rather than a fragmented approach.

11.4 Similar provisions were in force long before the 1930s. They were introduced in England in order to overcome⁶ the deficiencies of the common law offence of neglect; they seem to have been enacted for Scotland without a full examination of any need for their introduction. The criminal law of Scotland had the benefit of a much wider range of common law offences.⁷ It may be that Scots law would have been flexible enough to have adapted without statutory intervention. In any event the legislation of the 1930s had an undoubted Victorian foundation. Section 37 of the Poor Law Amendment Act 1868⁸ made it an offence for a parent wilfully to neglect to provide adequate food, clothing, medical aid or lodging for his children, being under fourteen and in his custody, so that their health should have been likely to be seriously injured. The current

6 Bevan, pp. 175 and 176.

7 Para. 13.6.

8 31 and 32 Vict, c. 122.

provisions may be traced through section 1 of the Prevention of Cruelty and Protection of Children Act 1889,⁹ section 1 of the Prevention of Cruelty to Children Act 1894,¹⁰ section 1 of the Prevention of Cruelty Act to Children Act 1904¹¹ and section 12 of the Children Act 1908.¹² Although several of the authorities relate to the earlier legislation, they undoubtedly remain valid.¹³

(b) The structure of the provisions.

11.5 The conduct comprehensively proscribed by these provisions clearly includes behaviour prejudicial to the physical welfare of the child.¹⁴ It requires little imagination to foresee that assault, ill-treatment, neglect, abandonment or exposure will sooner or later affect the physical integrity of the child. This conclusion is supported by the second limb of the provision, "in a manner likely to cause him [the child] unnecessary suffering or injury to health."¹⁵ The inclusion of the likelihood of suffering or injury indicates that Parliament intended the criminal law to intervene sooner rather than later, certainly without having to wait for the actual suffering or injury to

9 52 & 53 Vict, c.44.

10 57 & 58 Vict, c.41.

11 4 Edw.7, c.15.

12 8 Edw.7, c.67.

13 The history of the legislation was noted by Lord Alverstone C.J. in R. v Connor [1908] 2 K.B. 26.

14 Mental well-being is also covered; the provisions refer to "mental derangement."

15 In Brooks v Blount [1923] 1 K.B. 257 it was held that proof of actual suffering was unnecessary; proof of likelihood was sufficient.

materialise. Where a third person has intervened to obviate actual suffering or injury or the likelihood of such suffering or injury, section 1(3)(a) of the 1933 Act provides that a conviction shall not thereby be prejudiced. The first requirement however remains to be satisfied, namely assault, ill-treatment or any of the others. This may mean that the suffering or injury has actually come about before the prosecution is brought.

11.6 On a question of technical interpretation, it may be asked whether the second limb of the provision qualifies the act of assault as well as the causing or procuring of the assault. Textually that clause is somewhat removed from the requirement of assault. But there is probably no reason to suppose that the clause does not apply to all the preceding verbs in the subsection.¹⁶ The section would otherwise be illogical and unbalanced. In any event an interpretation sympathetic to the child would be appropriate. The existence of the clause is in effect an additional limitation upon the application of the section, even although it may have been intended by its inclusion to extend the range of its effectiveness. What, for example, amounts to unnecessary suffering or injury to health? Injury to health includes mental derangement, but "unnecessary" is a requirement difficult to apply. For example, if a father were to go away permanently and leave his son unsupervised, it could amount to abandonment in a manner "likely to cause him unnecessary suffering." But is the

16 Clarke Hall & Morrison, p.18 quoting R. v Hatton [1925] 2 K.B. 322.

suffering "unnecessary" where the child is on the one hand old enough in a physical sense to look after himself but on the other hand may be emotionally disturbed by his parent's absence? Such questions probably cannot be answered except in the circumstances of a specific case. It has however¹⁷ been suggested that the second limb of the subsection is insignificant in practice. Where a child is "neglected", for example, the almost inevitable consequence of the neglect would be unnecessary suffering or injury to health. This may be true as a matter of fact in most cases, but it cannot be true as a proposition of logic. Proof of the likelihood of such suffering or injury remains a prerequisite of a conviction, however technical it may be.

(c) The meaning of wilful.

11.7 Just as the likely consequence of the conduct contemplated by the subsection is an integral part of the statutory offences, so the conduct of the parent or other alleged offender must be "wilful." This requirement applies to all the elements in section 1(1) of the 1933 Act,¹⁸ although it was in the context of "wilful neglect" that the courts have analysed the meaning of "wilful". One of the earlier cases, R. v Senior,¹⁹ concerned a father of

17 Ibid., p.18, where it is suggested that direct proof that the neglect etc. did or was likely to cause unnecessary suffering or injury to health is not required, as it is likely to be inferred from the evidence of neglect itself (founding upon R. v Brenton (1904) 111 C.C.C. Sessions Pap. 309); Bevan, p.190, where it is stated that proof will not be "difficult".

18 As in the case of the likelihood of suffering or injury: Clark Hall and Morrison, p.13.

19 [1899] 1 Q.B. 283.

excellent character who had failed to provide medical aid or medicine for his child, aged eight or nine months and suffering from pneumonia. The father's excuse was that medical treatment was sinful. The charge was brought under section 1 of the Prevention of Cruelty to Children Act 1894. All the statutory requirements were satisfied except for "wilful." Clearly "evil intent" could not be attributed to the father. Equally clearly the father intended to do what he did by omitting to provide medical aid. This aspect of the case turned on the meaning of "wilful". As Lord Russell C.J. explained:-

"'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care - that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind."²⁰

This test may be applied to the circumstances of the case in this way. The father deliberately, but clearly not inadvertently, omitted to provide medical aid for the child. The issue was whether a reasonable parent would provide medical aid, presumably for the benefit of the child.

20 Ibid. at pp. 290 and 291.

A significant gap in the judicial reasoning lies in the almost automatic acceptance on all sides that the provision of medical aid would be for the child's benefit. The only rationalisation is that the need of the child for medical aid was too obvious for proof or argument.²¹

11.8 It may be that the child in question was in urgent need of medical aid. The gap is that no evidence seems to have been adduced on this point. The last phrase in the quotation from the judgment of the Chief Justice indicates that the benefit of the child was a matter for judicial knowledge and not an issue for proof. This approach may effectively deny to a parent the chance of explaining his attitude. It also gives to the judge an apparently limitless power to determine ex proprio motu, as it were, the question of "benefit." Since "neglect" has been treated as the omission to do something for the benefit of the child, the basic issue depends upon the judge's view of "benefit". If the method of trial is by jury, neglect becomes a matter of discretion for them. What is important is that the accused's views of "benefit" are ignored; his self-imposed

21 Lord Russell C.J.'s reference to the "experience of mankind": idem. A similar attitude prevailed in Oakey v Jackson [1914] 1 K.B. 216 at p.220 per Darling J. who said:- "... it is not necessary to know much about surgery to know that the operation for the removal of adenoids is very common in the case of children and that a failure to perform the operation may result in danger to the child's life if the child should ever happen to be attacked with illness."

standard is irrelevant.²² This approach is perfectly intelligible if it is assumed that the legislation is designed to protect children in as flexible a manner as possible. The issue for determination has become whether the accused has fallen short of the standard required by the judge or jury, not whether the accused has "neglected" this child. The criminality of the accused thus turns not so much upon a consideration of the welfare of the individual child, but upon the judge's or jury's view of the accused's behaviour in the light of the standard set by the tribunal. The attitude of the Chief Justice is founded upon the techniques of interpretation already discussed; namely, to have regard to the underlying policy of the legislation to protect the welfare of children.²³ This contrasts markedly with the individualisation of approach in other contexts.

11.9 A similar conclusion may be reached after studying H.M. Advocate v Clark and Clark.²⁴ A husband and wife were indicted under section 12(1) of the Children and Young Persons (Scotland) Act 1937 for wilfully neglecting their

22 R. v Lowe [1973] 1 AllE.R. 805 at p.807 per Phillimore L.J. who stated: "It did not matter what he ought to have realised as the possible consequence of his failure to call a doctor - the sole question was whether his failure to do so was deliberate and thereby occasioned the results referred to in the section."

23 [1899] 1 Q.B. 283 at p.290 per Lord Russell of Killowen C.J. who said: "... [the statute shows] an increased anxiety to provide for the protection of infants."

24 1969 S.L.T. 161.

child. The alleged neglect comprised failure to provide adequate food and medical aid. The defence suggested that the accused had not acted "wilfully" as they were only partially responsible for their behaviour by virtue of a mental or pathological condition short of insanity. The evidence of the psychiatrist would have been to the effect that the accused were unable, by reason of their impaired ability, to perceive and appreciate the emerging circumstances leading to the deterioration in health of their daughter.²⁵ The High Court of Justiciary upheld the decision of the Sheriff-substitute not to admit that evidence.²⁶

11.10 It was stated by the High Court firstly that a plea of diminished responsibility was not available except²⁷ in relation to murder. More importantly, the argument also considered section 12(1) of the 1937 Act. Lord Grant L.J.-C. said:-

"The argument for the applicants [accused] seems to me to proceed on a confusion between the two ingredients of such an offence:- (a) That there should be neglect (or ill-treatment, abandonment, assault, etc.) which is wilful - though it is difficult to conceive of conduct which is not wilful constituting assault; and (b) that this should be in a manner likely to cause the child unnecessary suffering or injury to health [after

25 Ibid. at p.162: see the reason given by the husband for the application.

26 Idem. 27 Idem. per Lord Grant L.J.-C.

quoting the sheriff-substitute]. In other words, while proof of wilfulness is essential to establish head(a), the test under head(b) is an objective one. That test is whether the neglect was 'in a manner likely to cause' and not whether it was 'in a manner intended to cause....' It is not suggested here that the applicants did not appreciate the nature of their acts or omissions or that these were not deliberate and intentional. The argument is, and the evidence proposed to be led was, to the effect that the consequences were not intended or foreseen."²⁸

The Lord Justice-Clerk thus impliedly applied the reasoning here attributed to the court in R. v Senior.²⁹ It must be conceded, of course, that, although the two courts adopted similar approaches to the matters before them, they postulated different justifications for doing so. In the English case the parent had neither wished nor intended to harm the child; he had acted in the way he did because of his unusual religious convictions. The Scottish parents, on the other hand, were allegedly behaving as they did because of fecklessness or incompetence. They were nevertheless acting intentionally or deliberately. In each case the

28 Ibid. at p.163. This analysis rejected the view expressed by Gordon, p.208 that "neglect may be negligent or intentional," thus distinguishing between wilful neglect and negligent neglect. This distinction would not now appear to be justified in terms of the statutory provision.

29 [1899] 1 Q.B. 283: para. 11.7 and 11.8.

accused parent's personal or individual wishes or circumstances were ignored. An external standard was imposed. In each case "wilful neglect" was established.

11.11 It will be recalled that in R. v Senior³⁰ the court based its conclusion upon the meaning of "neglect"; in H.M. Advocate v Clark and Clark,³¹ great weight was placed upon what has been described as the second limb of the subsection creating the offence. But the approach to "neglect" was essentially the same, certainly from the ultimate point of view of the child. There can therefore be little doubt that the test of "likelihood of suffering or injury" is objective and the mental or emotional state of the alleged offender irrelevant.³² The use of the word "wilful", therefore, in the offence of "wilful neglect" adds little if anything to what is needed to constitute child neglect beyond the usual requirements of mens rea.³³ The interpretation thus placed upon the statutory provisions in R. v Senior³⁴ and H.M. Advocate v Clark and Clark³⁵ is not restrictive and it remains fully consistent with the policy of protecting the physical and emotional well-being of the child.

30 Idem. 31 1969 S.L.T. 161.

32 It could however be relevant in the event of sentence being imposed: ibid. at p.163 per Lord Walker.

33 Cf. R. v Hatton [1925] 2 K.B. 322 at p. 324 where it was somewhat obliquely suggested by Lord Hewart C.J. that something more than ordinary assault was contemplated by section 12(1) of the Children Act 1908 in the context of wilful assault likely to cause unnecessary suffering.

34 [1899] 1 Q.B. 283. 35 1969 S.L.T. 161.

(d) Is the legislation a restrictive code?

11.12 The interpretation so placed upon the statutes of 1933 and 1937 in these two cases, although not restrictive, was not specifically founded upon the policy of the legislation, although it was clearly sympathetic to it. The cases are not examples of the liberal approach; they exemplify the literal approach. In a sense this is a tribute to the quality of the legislation. The provision may thus be regarded as framed properly so as to achieve its policy objective. It has not been impeded by legalistic technicalities.

11.13 The same is true of two further cases which demonstrate judicial common sense to criminal child neglect. It would however be too extreme to suggest that these two cases exhibited judicial disregard for legal technicalities. In R. v Hayles³⁶ a father was charged with ill-treating his child contrary to section 1 of the 1933 Act. The jury was directed that evidence of the parent's neglect to give the child medical attention was sufficient to sustain the charge of ill-treatment. The appeal against conviction was based on the ground that the judge had wrongly equated neglect and ill-treatment. Widgery L.J. did not accept that contention:-

"That [the creation of separate offences under section 1] would be a technical complication which would be highly undesirable, and one from which this court finds it possible to escape, because this court accepts the alternative

36 [1969] 1 AllE.R. 34.

contention of counsel for the Crown, that these words do not create separate and watertight offences."³⁷

Section 1 of the 1933 Act was in this sense regarded as a unitary provision. Thus, provided the conduct in question falls within the description of one or other of the "offences" in section 1, it does not matter whether the description of the conduct fits precisely the specific "offence" charged. In R. v Hayles,³⁸ the accused had been charged only with ill-treatment; and the court suggested that section 1(1) of the 1933 Act was what could be called a composite offence. On this basis there would be no objection to charging the accused with more than one of the constituent offences in section 1(1).³⁹ These considerations indicate therefore a liberal and non-technical approach to the interpretation of the legislation and hence by implication of the welfare of the child protected by these provisions.

11.14 In R. v Roe,⁴⁰ the problem was not the internal relationship of the "offences" in section 1(1) of the 1933 Act but the relationship between the offences in section 1 and other offences. The indictment of a father and mother

37 Ibid. at p. 37 per Widgery L.J. 38 Ibid.

39 This had happened in Williams (1910) 4 Cr. App. Rep. 89 where the accused was charged with neglect and exposure under the Children Act 1908, s.12(1) and in Boulden (1957) 41 Cr. App. Rep. 105 where the accused was charged with abandonment and neglect contrary to the Children and Young Persons Act 1933, s.1(1).

40 [1967] 1 W.L.R. 634.

for ill-treatment contrary to that section included other charges, namely causing grievous bodily harm with intent or inflicting grievous bodily harm. The father was found guilty on two charges, the mother on one. They appealed on the ground that further charges could not be added to the indictment, as section 1(1) was a completely self-contained code. Lord Parker C.J. rejected that contention;⁴¹ the indictment was held to be valid. There is no legal impediment, therefore, to charging parents with whatever offences may seem justified, in conjunction or alternatively, under statute or common law.

11.15 Although this happens frequently, there is no doubt that the charges are separate and must be proved independently. The requirements of the various offences are different and not interdependent. The death of a child, for example, as a result of circumstances amounting to wilful neglect under the 1933 Act does not necessarily constitute manslaughter.⁴² There is however a relationship between these offences. In R. v Watson and Watson⁴³ a husband and wife were charged with the manslaughter of their three year old child. Elwes J. circumvented some old and restrictive authorities by regarding manslaughter as⁴⁴ currently founded upon the statutory misdemeanour contained

41 [1967] 1 W.L.R. 634 at p.640.

42 R. v Lowe [1973] 1 All E.R. 805. Cf. 1933 Act, s.1(3)(b) which enables a conviction under s.1(1) to be sustained where the child or young person has died, a not infrequent consequence.

43 (1959) 43 Cr. App. Rep. 111. 44 Two cases decided in 1799 and 1836.

in section 1(1) of the 1933 Act. The authorities interpreting the 1933 Act become relevant to a charge of manslaughter. It is clear that legal technicalities are not to be allowed, so far as possible, to restrict legislation designed to protect children. The prosecutor thus has a fairly wide discretion in selecting how the statutory criminal law may be used to protect the welfare of children.

Section 3 - Neglect.

(a) Deficient care.

11.16 Most of the reported cases under section 1(1) of the 1933 Act deal with neglect. These cases illustrate a remarkable variety of examples of parental indifference to children under their care. A number result in death. Neglect is also the most general and least specific ground in section 1(1) of the 1933 Act. This may be the reason for its apparent relative popularity with prosecutors.⁴⁵

11.17 The offence of neglect has been judicially described as "the omission of such steps as a reasonable parent would take."⁴⁶ It is a concept lacking definitive precision and is thus liable to a degree of ambiguity.

⁴⁵ See the table, p.378. It should be recalled that persistent refusal or neglect to maintain certain persons is a contravention of the National Assistance Act 1948 (11 & 12 Geo. 6, c.29), s.5 1(1) and of the Ministry of Social Security Act 1966 (1966 c.20), s.30(1). There were similar provisions in the earlier Poor Law legislation (e.g. Poor Law Amendment (Scotland) Act 1845) which were however somewhat narrower than the present legislation. For the 1845 Act see Bryden v Wilson (1914) 30 Sh. Ct. Rep. 306, Wilson v Mannarn 1934 S.L.T. 353; for the 1948 Act see Corcoran v Muir 1954 J.C. 46.

⁴⁶ R. v Senior [1899] 1 Q.B. 283 at p.291 per Lord Russell of Killowen C.J.

Section 1(2)(a) of the 1933 Act however assists by providing:-

"a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf."

The device of "deeming" as used in section 1(2)(a) does not exhaust the possible circumstances of neglect. There seems to be no reason why conduct constituting "wilful neglect in a manner likely to cause unnecessary suffering or injury to health" other than within the description in section 1(2)(a) should not form the foundation of a competent charge; for example, leaving the child unattended,⁴⁷ permitting him to fall out of a window⁴⁸ or using drugs⁴⁹ unsuitable in relation to children.

11.18 Section 1(2)(a) is comprehensively framed and relatively specific; and it sets an objectively ascertainable standard. Failure to provide medical aid, one of the more common instances of neglect, may comprise various types of conduct: for example, refusal to provide

47 MacAulay [1971] The Times, 2 June; Barrie [1971] The Times, 30 June.

48 Horwood [1971] The Scotsman, 19 March and 6 April.

49 Idem.

aid or medicine for religious reasons;⁵⁰ refusal to permit
 an operation for adenoids;⁵¹ complete failure to provide
 medical attention after the child had fallen downstairs;⁵²
 "feckless and incompetent" parental care by failing to
 provide adequate medical aid;⁵³ failure, by a parent of low
 intelligence, to call a doctor when the child became ill.⁵⁴
 The "neglect" element is thus probably a matter of fact
 determinable in the circumstances of the individual case.⁵⁵
 The motive of the alleged offender, whether good or bad,
 is irrelevant; the neglectful act however must be "done
 deliberately and intentionally."⁵⁶

11.19 These general comments apply mutatis mutandis
 to failure to provide adequate food, clothing or lodging.
 Often it may be merely parental inability to provide rather
 than unwillingness to do so. In Napier⁵⁷ the children were
 exhausted, grossly under-nourished and in a verminous
 condition. A poorly furnished and dirty house,⁵⁸ deficient
 clothing,⁵⁹ no heating or absence of food⁶¹ are not uncommon

50 R. v Senior [1899] 1 Q.B. 283.

51 Oakey v Jackson [1914] 1 K.B. 216.

52 R. v Hayles [1969] 1 AllE.R. 34.

53 H.M. Advocate v Clark and Clark 1969 S.L.T. 161.

54 R. v Lowe [1973] 1 AllE.R. 805.

55 Oakey v Jackson [1914] 1 K.B. 216 at p.220.

56 R. v Senior [1899] 1 Q.B. 283 at p.291.

57 [1971] The Scotsman, 10 November.

58 Thomson [1972] The Scotsman, 5 October; Bowman [1974]
The Scotsman, 27 July and 13 August.

59 Thomson [1972] The Scotsman, 5 October; Bowman [1974]
The Scotsman, 27 July and 13 August; Dawson [1974] The Scotsman, 7 August.

60 Bowman [1974] The Scotsman, 27 July and 13 August.

61 Bowman [1974] The Scotsman, 27 July and 13 August; Dawson
[1974] The Scotsman, 7 August.

features of neglect. In such cases the court may be more concerned with the immediate future of the children than with the imposition of a severe penalty; but the deterrent sentence is not unknown. In any event neglect by failing to provide adequate food, clothing or lodging attracts no conceptual problems.

(b) Failure to provide money.

11.20 Neglect in this sense has a close affinity with failure to maintain the child in terms of the Scottish common law obligation to aliment supported by the offences created by section 51(1) of the National Assistance Act 1948 and section 39(1) of the Ministry of Social Security Act 1966. These offences were created largely to fill the gaps in the common law of England.⁶² The obligations underlying these civil and criminal liabilities are in practice enforceable only in monetary terms. What then is the relationship between neglect in this sense and failure to provide money for maintenance purposes?

11.21 In R. v Connor⁶³ the foundation of the charge was that the father had given the mother insufficient money to feed the children. He left. Only the aid of a relative kept the family from the workhouse. The evidence was to the effect that the children were clean but poorly clad and fed. The father was found guilty of wilful neglect under section 1(1) of the Prevention of Cruelty to Children Act 1904. His defence was also rejected on appeal:-

62 Paras. 44.60 to 44.66, 63 [1908] 2 K.B. 26.

"But in the present case the fact was that the children were half starved, although not wholly starved. It is no answer to the charge to say that some person prevented them from being wholly starved." ⁶⁴

It should be recalled that the 1904 Act did not contain a provision similar to section 1(2)(a) of the 1933 Act which sets out certain circumstances deemed to constitute neglect for the purposes of section 1(1) of that Act. The Court of Criminal Appeal thus considered neglect in the wider context. Ridley J., the trial judge, had appeared to accept the proposition that the mere omission to pay part of his earnings to his wife constituted wilful neglect on the part of the father. ⁶⁵ Two members of the Court of Criminal Appeal agreed but Grantham J. had reservations. Failure to provide food or the money with which to buy food thus probably amounts to a breach of the duty to maintain or aliment the child. ⁶⁶ Neglect in this sense may probably be equated with failure to maintain. This represents a broad but nevertheless literal interpretation of neglect.

11.22 The decision of the High Court of Justiciary in Henderson v Stewart, ⁶⁷ on the other hand, is clear but the

64 [1908] 2 K.B. 26 at p.31 per Lord Alverstone C.J. In a sense this view anticipated section 1(3)(a) of the 1933 Act.

65 Ibid. at p.32.

66 Failure to make payments under a separation agreement plus actual or likely suffering or injury to health may also constitute neglect: Brooks v Blount [1923] 1 K.B. 257.

67 1954 J.C. 94.

reasoning unhelpful in this context. The father had failed to make any payment towards the maintenance of his child, although he had the means to do so. The child was maintained out of funds from the National Assistance Board and gifts from his grandmother; there was never any danger of injury to the health of the child. The father was charged with wilful neglect under section 12(1) of the Children and Young Persons (Scotland) Act 1937. He was acquitted by the trial judge⁶⁸ who was not satisfied "that the effect of section 12(2)(a) of the 1937 Act was to make a mere failure to maintain an offence under section 12(1)."⁶⁹ According to his analysis the "deeming" provision, section 12(2)(a), was intended to "remove the necessity for proof that the neglect alleged was of the character likely to cause injury, still leaving it to the Crown to prove that there was wilful neglect within the meaning of section 12."⁷⁰ On the other hand Lord Cooper L.J.G. on appeal in the High Court concluded that the trial judge ought to have convicted the accused. He pointed out that the sheriff-substitute had ignored relevant English authorities which should have been followed for they dealt with legislation largely uniform throughout the United Kingdom. The difficulty of that comment is that the authorities to which he referred do not specifically relate to this aspect of the case. The decision

68 Sheriff-substitute Middleton. 69 1954 J.C. 94 at p.96.

70 Idem. 71 Ibid. at p.98.

72 Liverpool Society v Jones [1914] 3 K.B. 813; Brooks v Blount [1923] 1 K.B. 257.

of the High Court may thus lack cogency. It is nevertheless suggested that the sheriff-substitute was wrong in holding that failure to maintain was not neglect; the relevant English view seems preferable. The practical solution may be for failure to maintain to be prosecuted under the social security legislation. An example may be the case of ^{7 3} Wimbury. The newspaper report of that case does not disclose under which statute the charge was brought but the reference to "persistent failure to maintain" and the receipt of a large sum in name of social security indicate that the prosecutor was relying upon the social security legislation. The facts of that case seem peculiarly appropriate to such a charge.

11.23 There is another aspect of Henderson v Stewart.^{7 4} The offence in section 12(1) of the 1937 Act comprises two elements: wilful neglect and the likelihood of suffering or injury. The sheriff-substitute, it is suggested, erred in ignoring the likelihood of suffering, particularly for the reason given by him. To substantiate this point, it should be recalled that neglect implies an omission to do something. The statutory offence requires proof of the likelihood of unnecessary suffering or injury to health. This element comprises the consequences of the omission. So a mere omission is clearly not enough. In this sense the need to prove the likelihood of suffering or injury is a limiting

73 [1974] The Scotsman, 19 June.

74 1954 J.C. 94.

factor. In Henderson v Stewart⁷⁵ the sheriff-substitute apparently regarded the "deeming" provision in section 12(2)(a) of the 1937 Act as eliminating the need for proof of that second requirement.⁷⁶ That, it is suggested, is not so. Section 12(2)(a) enacts that failure to provide adequate food, clothing or lodging, in effect failure to maintain, shall be equivalent to neglect in a manner likely to cause injury to health. It should be emphasised that it is deemed equivalent to neglect not to wilful neglect. It is the total offence, less "wilful", which is equated with failure to provide the necessities. The issue in that case, it is suggested, was not whether failure to make payments to the wife amounted to the offence of neglect but whether failure to make payments amounted to failure to provide food. Wilful failure to provide food would constitute the offence of neglect. The reports of R. v Connor⁷⁷ and R. v Senior⁷⁸ should have been drawn to the attention of the sheriff-substitute. R. v Senior⁷⁹ was certainly mentioned by the members of the High Court. It is odd that R. v Connor⁸⁰ did not form part of their deliberations. It is also regrettable that the succinct phraseology of the legislation seems to have escaped the attention of the court. A closer scrutiny of the provisions would probably have avoided some of these difficulties and contributed more to achieving the object of the legislation.

75 Idem. 76 Ibid. at p.96.

77 [1908] 2 K.B. 26.

78 [1899] 1 Q.B. 283.

79 Idem.

80 [1908] 2 K.B. 26.

Section 4 - Other grounds for conviction.

11.24 Although section 1(1) of the 1933 Act has been regarded comprehensively,⁸¹ neglect has not in practice been complicated or prejudiced by reference to other types of criminal conduct under that section. In Williams⁸² a father was charged with neglecting and exposing his children under section 12 of the Children Act 1908. The charge of neglect was discontinued, as there was sufficient evidence of exposure. The father had taken his children out of a workhouse and set off in bad weather on a journey of thirty miles. He declined minimal lodging. There seems little doubt that this was exposure. His contention in an unsuccessful appeal from conviction was that there could be no exposure without abandonment.⁸³ This point was not fully dealt with in the judgment of the Court of Criminal Appeal. The implication however was that exposure did not necessarily imply abandonment. Darling J. relied partly upon the view of the policy of the Act favoured by him, namely, "to prevent unnecessary suffering."⁸⁴ Unfortunately the concept of exposure was not analysed by the court in depth. It is however suggested that exposure and abandonment are distinct concepts. They are not in any sense mutually interdependent.

81 R. v Hayles [1969] 1 AllE.R. 34: para. 11.13.

82 (1910) 4 Cr. App. Rep. 89.

83 (1910) 4 Cr. App. Rep. 89 at p.93 per Darling J.

84 Idem.

A child probably can be exposed without being abandoned; for example, by being left unattended for a relatively short period. In any event there must be a presumption at least in favour of two distinct concepts where Parliament uses the words in close proximity. Otherwise the provision would be partially otiose.

11.25 On the other hand there is no reason to suppose that the same conduct could not constitute both exposure and abandonment within the meaning of the 1933 Act. For example, in ⁸⁵Prowse the mother of an illegitimate girl aged ten months was convicted for abandoning the child by leaving her "in near freezing conditions in a disused chalk pit after an evening's drinking." This probably also amounted to exposure. The ordinary meaning⁸⁶ of the word "exposure" involves a negative aspect, leaving unprotected, particularly from the weather; and a positive aspect, turning a person out of doors. "Abandonment" involves the surrender or relinquishment of the child. There are probably positive and negative elements of that word just as in the meaning of "exposure". For these reasons there are probably grounds for concluding that there can be exposure without abandonment and vice versa.

11.26 To secure a conviction under section 1(1) of the 1933 Act it is essential to prove likelihood of

85 [1974] The Scotsman, 25 May.

86 O.E.D.

unnecessary suffering or injury to health in addition to proof of exposure or abandonment. This point attracted the attention of the Court of Criminal Appeal in R. v Whibley.⁸⁷ The circumstances were odd. The accused appeared in court with his five children in order to assist his sister-in-law in the recovery of the care of her children. The case was not heard and he walked out of the court, leaving his children. The charge of abandonment under section 1(1) of the 1933 Act succeeded in the trial court but on appeal the conviction was quashed. The reason of Branson J. was rather negative:-

"... it does appear to me that it is wrong to say that, if the circumstances are such that a child is a little frightened, or that there may be some mental suffering caused by its being left in such circumstances, it is a case which can be brought within this section of the Act."⁸⁸

The essence of the decision seems to have been the absence of any suffering or injury to health. A different decision was reached in equally odd circumstances in Moffat.⁸⁹ The mother of two young children appearing at Glasgow Sheriff Court admitted having abandoning them at a city social work department office about one month earlier. Such a decision lacks authority and it cannot be assumed from the newspaper

87 [1938] 3 AllE.R. 777.

88 Ibid. at p.778.

89 [1974] The Scotsman, 19 September.

report that the charge was brought under the 1937 Act.

If it was a statutory offence, the decision must be regarded at best as doubtful. There is thus no authoritative pronouncement on what constitutes either abandonment or exposure in this context.⁹⁰

11.27 There is nothing to take the analysis much further even in the judgment of the Court of Criminal Appeal in Boulden.⁹¹ A mother left her family, telling her husband that she was going to Scotland. Later the father telephoned the N.S.P.C.C. to tell them that the five children were alone in the house. It was afterwards discovered that the children were alone in the house in darkness with only a small quantity of food. The father had left. His conviction of abandonment under section 1(1) of the 1933 Act was upheld by the Court of Criminal Appeal. According to Gorman J. the accused's intention was probably "to clear out, to leave their children to their fate and to wipe his hands clean of them."⁹² Abandonment was treated as leaving a child

90 The concept of neglect to maintain appears in social security, formerly poor law, legislation. Although abandonment did not appear in the poor law legislation, the related concept of desertion was part of one of the offences created by the Poor Law Amendment (Scotland) Act 1845, s.80: see Motion v McFall (1899) 1 Fraser (J) 85, Inspector of the Poor for Glasgow Parish v Reid (1909) 25 Sh. Ct. Rep. 217 and Wilson v Mannarn 1934 S.L.T. 353. These cases did not examine the concept of desertion; they were concerned with technical matters of procedure and the relationship between the obligation and the use of public funds.

91 (1957) 41 Cr. App. Rep. 105.

92 Ibid. at p.110.

to his fate. This would seem to be in accord with the ordinary meaning of the word. It is similar in some respects to the positive aspect of exposure.⁹³ As with neglect, so with exposure and abandonment the courts have complicated what are probably reasonably straightforward issues. Closer attention to the detailed statutory requirements would have given greater effect to the policy of the legislation in protecting children and at the same time simplified the law.

Section 5 - The persons liable to be affected by the legislation.

(a) The background.

11.28 So far this chapter has looked at the conduct necessary to create criminal liability under the legislation. The Act also identifies the range of persons to whom it applies.⁹⁴ The welfare of the child is affected only indirectly by this provision. The general principle is that criminal liability under the Acts may relate to any one with actual or potential parental responsibilities towards the child. Statutory liability was created, of course, to overcome some of the problems of the common law offences in relation to children.⁹⁵ The significance in appropriate circumstances of such offences,⁹⁶ particularly in Scotland, is in no way abated by the enactment of these statutory liabilities.

93 Para. 11.25.

94 Children and Young Persons Act 1933, s.17; Children and Young Persons (Scotland) Act 1937, s. 27. .

95 Para. 11.4.

96 Chapter 13.

The interests of the child are thus protectable by statute in proportion to the number of persons deemed to have custody for the purposes of these provisions. This statutory protection comprises a quantitative extension of parental and quasi-parental duties and a corresponding limitation of parental and quasi-parental rights.

11.29 Section 1(1) of the 1933 Act applies to "any person who has attained the age of sixteen years and has the custody, charge, or care of any child or young person under that age."⁹⁷ Custody is a concept which has an undoubted but sometimes ambiguous and vague juridical connotation.⁹⁸ On the other hand charge or care are largely matters of fact determinable in the circumstances of each case. Until 1973⁹⁹ custody would normally have been vested in the father of the child or, where the father was dead or the child illegitimate, in the mother. Such persons were clearly among those to whom the provisions of section 1(1) of the 1933 Act applied. It would be important in practice to ensure that such a person charged with a breach of section 1(1) was a person with custody. If the matter of custody had been regulated judicially, ascertaining the custodial party would not be a problem. But in either case it could remain an important matter to identify who had charge or

97 Likewise 1937 Act, s.12(1).

98 Despite the statutory explanation of concepts in the Children Act 1975 (1975 c.72), ss.86, 87 and 107(2).

99 I.e. according to the "static" rules of custody.

care of the child if it happened to be someone other than the custodial parent. This has been no longer a real problem, as between mother and father at least, since the enactment of the Guardianship Act 1973¹ which has conferred equal rights of custody upon each parent. There remains the question of deciding who has charge or care of the child; the Act provides minimal assistance in deciding this point.

11.30 These problems do not appear to be statistically important in practice. Although no scientifically based investigation has been done, a clear impression emerges from an examination of a number of offences against children reported in the newspapers over a period of two or three years. The offences in question are set out in the Table, p378. Not all the offences therein are statutory but the overall pattern is clear. Almost all the offences were committed by either the mother or father or both acting together. To some extent the party charged is a reflection of the nature of the offence. But that conclusion cannot be pressed too far, for either the mother or father is capable of committing any offence against their child. It must be emphasised that these are mere random examples. They are claimed to establish nothing except the indication that most offences against children are committed by parents.

11.31 This conclusion probably causes no surprise. Few people other than parents are caught by the Act, although the small number of non-parents convicted under the Act

1 1973 c.29.

probably justifies their inclusion. It would nevertheless appear to be the intention of the legislature to make it particularly difficult for parents to escape liability by arguing that it does not apply to them. Such a view would be entirely consistent with the policy of protecting the welfare of children, particularly against their parents. It would no doubt have been possible for these provisions to have applied to anyone at all. That makes sense in the case of assault, but not in relation to neglect. Neglect, and possibly also abandonment and exposure, imply an existing relationship between the child and the allegedly negligent party. Unless every person is to come under a general responsibility to each and every child in the community, a proposition going beyond currently accepted concepts of jurisprudence, the limits of responsibility must be defined. The legislation purports to do precisely that. This is also one of the areas of complexity for the common law. It cannot be said therefore that the law in this area protects children generally; it protects them only from certain stated sources of identifiable risk and responsibility.

(b) The legislation.

11.32 Section 17 of the 1933 Act gives some assistance in interpreting the words "custody, charge or care." It would seem that that provision merely operates as a presumption; nor is it exhaustive;² in effect it is an amplification of

² Liverpool Society for the Prevention of Cruelty to Children v Jones [1914] 3 K.B. 813.

section 1(1).³ There is thus room for the normal meanings of "custody, charge or care" to apply. The more important part of the provision⁴ relates to custody:-

"Any person who is the parent or legal guardian of a child or young person or who is legally liable to maintain him shall be presumed to have the custody of him, and as between father and mother the father shall not be deemed to have ceased to have custody of him by reason only that he has deserted, or otherwise does not reside with the mother and child or young person."

The policy of this provision is clearly to ensure a static and inalienable concept of custody by excluding a consideration of the merits of the parental conduct. A parent thus probably cannot be deprived of or forfeit his right to custody for the purposes of section 1(1) of the 1933 Act.⁵ The concepts of "charge" and "care" are similarly defined.

11.33 Section 17 of the 1933 Act was analysed by Lord Hewart C.J. in Brooks v Blount:⁶-

3 Ibid. at p. 816 per Lord Coleridge J.; Brooks v Blount [1923] 1 K.B. 257 at p. 263 per Lord Hewart C.J.

4 Children and Young Persons Act 1933, s.17; Children and Young Persons (Scotland) Act 1937, s.27.

5 Cf. judicial deprivation of custody.

6 [1923] 1 K.B. 257.

"... there is ... a scale of persons in a descending degree of importance, and there is a presumption with regard to each of them. There are persons who because of their blood relationship or legal positions are presumed to have the custody of a child. There are persons who have the charge of a child and are presumed to have the charge because the child has been committed to them by the person having the custody of the child. Finally there are the persons who de facto have the care of the child. Before a person can be convicted under s.12 of the wilful neglect of a child it is necessary to show that he is a person of the kind against which s.12 is directed and that he has committed an act to which s.12 refers."⁷

The presumption is thus founded upon an actual relationship, parentage, or upon a legal relationship, guardianship or liability to maintain. The traditional and statutory concepts of custody are thus cast aside by this provision. It would seem that parents are most likely to commit offences against their children and by providing in effect an inalienable concept of custody section 17 directs the attention of section 1(1) against those most dangerous to children. The welfare of children is to that extent more likely to be protected. A straightforward construction of the provisions of section 17 in relation to section 1(1) achieves this effect.

11.34 The achievement of that objective depends upon two propositions of fundamental significance. Custody

7 Ibid. at pp. 263 and 264.

"imposed" by the presumption in section 17 cannot be avoided. Normally custody is now regarded as a "right" inhering in a parent. The second is that, far from simply being a right, custody in terms of sections 1 and 17 acquires the nature of a "duty". This is a particularly interesting development of the law. Custody emerged as a right from the early duty of a parent as guardian to "care" for the child. The ensuing emphasis on "right" is now giving way again to statutory notions of "duty".⁸

11.35 In R. v Connor,⁹ a case under the Prevention of Cruelty to Children Act 1904 which did not contain a provision like section 17, the means provided by a father for his children were inadequate. He left and the family survived only by virtue of the benevolence of an aunt. Lord Alverstone C.J. rejected the argument that the father did not have custody of the children for the purposes of the Act:-

"Can it be seriously contended that the parent in the present case had not the custody of the children? If the contention were upheld, it would follow that the prisoner, by living where he ought not to live, could get rid of the custody of his child."¹⁰

Thus a parent by living apart could not thereby divest himself of the custody of his child so as to free himself

⁸ Chapter 2.

⁹ [1908] 2 K.B. 26.

¹⁰ Ibid. at p.31.

from criminal liability under section 1(1) of the 1933 Act. If, while apart, he wilfully neglected his child as contemplated by section 1(1), he would be guilty of an offence.

11.36 The father in that case was the person actually responsible for the neglect of the child. In Poole v Stokes¹¹ the father, who was not in that sense culpable, was also guilty of the offence of wilful neglect. The parents had agreed to live apart; the wife had charge of the children. A sum was paid by the father to his wife regularly. This was sufficient for the maintenance of herself and the children. The mother however failed to provide proper food and clothing for them. The father knew of the wife's neglect and several times had complained to the N.S.P.C.C. Both were charged but only the mother was convicted by the justices. The Divisional Court on appeal held that the father also should have been convicted. Channell J. argued that paternal¹² delegation of the parental functions to the mother did not allow the father to escape from his responsibilities breach of which amounted to an offence under section 1(1) of the 1933 Act. Intimating his wife's deficiencies to the N.S.P.C.C. similarly failed to exempt him from liability. Nothing therefore enabled him to avoid his ultimate responsibility. This conclusion was based firmly upon a literal interpretation of the statutory presumption:-

11 [1914-15] All E.R. Rep. 1083.

12 Ibid. at p. 1085.

"There was nothing, so far as we can see, to prevent him from taking his children away from his wife. Section 12(1) of the Act says that a parent who is legally liable to maintain a child shall be deemed to have neglected him if he fails to provide adequate food, clothing and so forth. I understand that to mean that he is to be punished as if he were guilty, although there may be no moral blame attaching to him."¹³

A similar approach was adopted in Brooks v Blount.¹⁴ Salter J. went further than was probably necessary for his decision. He took the doctrine of the inalienability of custody to its extreme limit by asking the question when may a parent not be regarded as having custody. Referring to section 38(2) of the 1908 Act,¹⁵ he argued:-

"These are presumptions of law. I think that the person who has the custody of a child cannot be heard to say that he has not the custody of the child unless he is deprived of the custody by the order of a competent court. A person to whom has been committed the charge of a child by the person having the custody of the child cannot be heard to deny that he has the charge of the child, and a person who has actual possession or control of a child cannot be heard to say that he has not the care of the child."¹⁶

13 Ibid. at pp. 1085 and 1086.

14 [1923] 1 K.B. 257.

15 The equivalent of the 1933 Act, s.17.

16 [1923] 1 K.B. 257 at p.267.

11.37 This concept of the inalienability of custody has also been accepted by the Scottish courts¹⁷ in relation to the identical legislation which applies in Scotland. The same approach has been adopted in England¹⁸ in relation to the common law offences analogous to wilful neglect and the other grounds in section 1(1) of the 1933 Act. This has been achieved largely by applying to the common law offences, often manslaughter, the same presumptions which apply to the statutory offences, although technically, it must be conceded, the statutory provisions do not apply. There is therefore something in the nature of a technical hiatus in relation to the non-statutory offences.

Section 6 - Conclusion.

11.38 This analysis shows clearly two important aspects of the statutory protection of the objective welfare of the child. A concise and literal interpretation of section 1(1) of the 1933 Act and its antecedents and equivalents directly protects the welfare of children and such welfare is protected by an objectively prescribed standard of behaviour on the part of those most likely to damage or injure the integrity of the children. There are certain qualifications. From time to time, for example, the courts have regard to legislative policy in solving certain interpretational difficulties. Moreover the sanction imposed by the statutes analysed is criminal. It thus operates retrospectively in

17 Henderson v Stewart 1954 J.C. 94.

18 R. v Watson and Watson (1959) 43 Cr. App. Rep. 111.

the individual case by imposing a penalty upon defaulting parents. By then it may be too late to save the child from injury. In the general case it operates prospectively as a preventive measure only as a deterrent. It has not been effective in preventing all criminal abuse of children. Hence Parliament has increasingly intervened with other solutions.¹⁹ The statute does not apply to every species of conduct likely to affect children or to every person likely to behave detrimentally towards children.²⁰ Nor is it likely that such all-embracing legislation could, and perhaps even should, be enacted. The common law fills some of these gaps.²¹ It would nevertheless be unwise to claim that the common law and statute law between them cover every eventuality. These rules go some way to protecting the welfare of children. Without them the law would be less effective.

19 Part 5.

20 This is an example of the proposition that statutory provisions are always limited by their own terms, however broadly drafted.

21 Chapter 13.

CHAPTER 12OTHER STATUTORY OFFENCESSection 1 - Introduction

12.1 Although section 1(1) of the Children and Young Persons Act 1933 and its equivalents and antecedents are probably the most important provisions protecting the welfare of children through the medium of the criminal law, there are a number of other relevant criminal provisions. Several are set out in Part 1 of Table I. Many statutory offences of general application also protect the welfare of children just as they safeguard the interests of the population generally.¹ This analysis is not concerned with them.

12.2 Most of the examples in Part 1 of Table I have an immediate impact upon the welfare of the child. Others on the other hand affect the children in a more oblique manner. Some rest upon the assumption that the welfare of the child is best protected by contact with the child's parents. It would therefore follow that protection of the parents' rights automatically safeguards the welfare of their children. Most static rules of law governing the parent-child relationship are probably an exegesis of that presumption, but when the law operates dynamically, some of these presumptions and concepts become arguably irrelevant,

1 E.g. Race Relations Act 1965 (1965 c.73); Firearms Act 1965 (1965 c.44); Dangerous Drugs Act 1965 (1965 c.15); Weights and Measures Act 1963 (1963 c.31).

certainly less significant. Sections 55 and 56 of the Offences against the Person Act 1861² and sections 12(1) and 20(1) of the Sexual Offences Act 1956³, for example, enforce parental rights, thereby obliquely protecting the welfare of the child. They proscribe the removal of the child from her parents for non-sexual as well as sexual purposes.⁴

12.3 The criminal offences set out in Part 1 of Table I affect differing aspects of the welfare of the child. Bevan classifies these provisions as protecting the physical well-being of the child, the child's moral welfare and both.⁵ Such a classification discounts the emotional and psychological integrity of the child. This may be a factor too tenuous to isolate easily but it is one of increasing significance where there is an element of discretion.⁶ This conclusion is nevertheless probably inevitable in view of the conciseness of the criminal legislation compared with the greater flexibility of the functional approach where it is open to exercise a statutory discretion.

12.4 Many of the provisions creating criminal offences are couched in fairly complex, although concise, terms. Most of the issues likely to arise in connection with such offences will probably be questions of fact. Legal problems admittedly may arise, particularly in determining the extent and application of the legislation: in other words, problems of interpretation. They will of course affect the welfare of the

2 This applies only in England. 3 This also applies only in England.

4 This protection is normally afforded only to the girl: Bevan, p.232.

5 Bevan, p.175, 6 E.g. in custodial disputes.

child, simply because the statute affects children. But these legal problems will not involve the role or substance of welfare as such. The most likely candidates for legal problems of this type are the Offences against the Person Act 1861⁷ and the Sexual Offences Act 1956⁸, for example, questions of age,⁹ the legal quality of the sexual intercourse in connection with certain offences,¹⁰ questions of possession and charge or care of the child.¹¹

Section 2 - Abandonment and Exposure.

12.5 Most of the offences in Part 1 of Table I have been subjected to relatively less judicial scrutiny than section 1(1) of the Children and Young Persons Act 1933. An examination of the authorities nevertheless indicates how they operate in practice. Section 27 of the Offences against the Person Act 1861 prohibits unlawfully abandoning or exposing any child, being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured. Although these requirements are more onerous than those of section 1 of the 1933 Act, there is a clear affinity between this provision and the grounds of abandonment and exposure in section 1 of the 1933 Act. In R. v Falkingham,¹²

7 24 & 25 Vict., c.100.

8 14 & 15, Eliz. 2, c.69.

9 Bevan, p.223; he points out that the defendant's belief about the girl's age being no defence is consistent with the policy of protection underlying the Act. The rule that the girl's consent is no defence is also consistent with that policy.

10 R. v Chapman [1959] 1 Q.B. 100 where it was held that "unlawful" in the Sexual Offences Act 1956, s.19 amounted to "extra-marital" intercourse; see also Watson (1885) 5 Couper 637.

11 Bevan, pp.228 to 230. 12 (1870) L.R. 1 C.C.R. 222.

for example, it was held that the action of a mother and another who assisted her amounted to abandonment under section 27 of the 1861 Act. A very young child had been placed in a hamper and sent by train to the residence of the putative father. The child was found to be alive and unharmed on delivery to the father's address twenty-five minutes after the half-hour train journey.

12.6 ¹³ The issue in R. v White was even clearer. The mother brought her child and left him outside the house of the father from whom she was separated. She called out: "Dill, here's your child; I can't keep it. I am gone." The father later came out, stepped over the child and went away. His attention was again drawn twice to the presence of the child; he ignored him. The police later found the boy, cold and stiff; he was later revived. The Court of Criminal Appeal confirmed that the father was guilty of both abandonment and exposure contrary to section 27 of the 1861 Act. Little attention was paid to the concept of abandonment or exposure. Presumably it was clear beyond argument that the conduct could be so described.

12.7 ¹⁴ In any event the decisions in R. v Falkingham and R. v White¹⁵ are conceptually consistent with the criteria discussed in relation to abandonment and exposure under section 1(1) of the 1933 Act. In R. v White¹⁶ the court was¹⁷

13 (1871) L.R. 1 C.C.R. 311. 14 (1870) L.R. 1 C.C.R. 222.
 15 (1871) L.R. 1 C.C.R. 311. 16 Paras. 11.24 to 11.27.
 17 (1871) L.R. 1 C.C.R. 311.

concerned with the proximity of the relationship between the father and the child. Section 27 of the 1861 Act does not stipulate who may be liable: it therefore applies indiscriminately. Nevertheless the judicial view on the application of the provision is consistent with what later became the presumption contained in section 17 of the 1933 Act.¹⁸ Martin B. at first thought the statute could only apply to persons who had had the "actual custody and possession" of the child. But he went on:-

"But the prisoner here was the father of the child, entitled to its custody and legally bound to its protection. I do not differ from the rest of the Court."¹⁹

The link between child and offender is thus liability to protect. Blackburn J. however seemed to rely also on the parent-child relationship as such:-

"When the child is left in a position of danger of which he [the father] knows, and from which he has full power to remove it, and he neglects his duty of protection, and lets the child remain in danger, I think this is an exposure and abandonment by him."²⁰

Knowledge of danger was a factor, but it was relevant for Blackburn J. only in the parent-child relationship. The significant aspect, positively adverted to by Martin B., is

18 Paras. 11.32 to 11.37.

19 (1871) L.R. 1 C.C.R. 311 at p.314.

20 Ibid. at p.314.

that these interpretations give effect to the natural meaning of the relevant words. There was no reliance upon aids to interpretation. The legislation was appropriate in the normal way to achieve the protection, albeit retrospectively, of the child.

Section 3 - Children in licensed premises.

12.8 An even stronger instance of an effective and literal interpretation may be found in Donaghue v McIntyre.²¹ The holder of a licence for the sale of liquor was charged under section 120(1) of the Children Act 1908 with permitting a child to be in the bar of the licensed premises. It was held that the partitioned box in which the children were situated did not form part of the licensed premises. So far as Sir J.H.A. Macdonald L.J.-C. was concerned, the purpose of the Act was perfectly synonymous with the language used:-

"I need hardly say that a judge has no power to extend the application of an Act of Parliament, even if he thinks it is unsuccessful as it stands; but in the present case I do not think the judge's opinion is well founded. The purpose of the Act is to prevent children being brought into contact with people who frequent the bar and with what is called the atmosphere of the bar of the premises, and here that purpose was effected, for the children were not, in my opinion, taken into a place which was within the atmosphere of the bar, and were not taken to a place which was in any true sense the bar at all."²²

21 1911 S.C. (J.) 61.

22 1911 S.C. (J.) 61 at p.66.

If, arguably, the purpose of the provision had been to avoid the presence of children in such premises not only within but also adjacent to the bar, then a strict interpretation would not have achieved such a purpose. Probably the provision in question was intended to protect the moral rather than the physical welfare of the child. Moral welfare is rather flexible in content; perhaps the provision should be interpreted in a similarly flexible manner. Much thus depends upon the policy of the Act and how it may be identified and defined; a problem already discussed in relation to this case.²³

Section 4 - Death of the child.

12.9 One of the more difficult branches of law affecting children and thus the welfare of children is homicide or more correctly the deliberate or reckless killing of a child. It seems to be true for both England²⁴ and Scotland²⁵ that the prosecution in the past was faced with considerable difficulties in proving for common law purposes what happened at and around the time of birth, including proof of the child's independent existence.²⁶ The deaths of older children attracted somewhat different

23 Para. 8.22.

24 Bevan, pp.176 to 179 and 185 to 188.

25 Gordon, p.753; Hume, Commentaries, 1.291.

26 H.M.A. v McAllum (1858) 3 Irvine 187.

problems.²⁷ Statute has thus intervened in both jurisdictions to simplify the issues triable in relation to the peri-natal death of children. The offence of concealment of birth was created for England in 1623²⁸ and is now to be found in section 60 of the Offences against the Person Act 1861. Concealment of pregnancy in Scotland originated in the Act of 1690²⁹ and is presently regulated by the Concealment of Birth (Scotland) Act 1809.³⁰

12.10 According to Gordon,³¹ the essence of the Scottish offence comprises a failure to reveal the birth. The practice apparently is to treat any potential offender sympathetically by regarding any revelation³² as a bar to proceedings. This represents a narrowly strict, if not a restrictive,

27 E.g. an allegation of murder brought about by exposure was irrelevant: H.M.A. v Kerr (1809) 3 Irvine 627 and 645; but an allegation of murder through striking the child's head on the wall or floor was competent: H.M.A. v Craig (1862) 4 Irvine 189. The creation of statutory offences by virtue of the Children and Young Persons Act 1933 s.1 and the Children and Young Persons (Scotland) Act 1937 s.12 has made homicide by omission easier to sustain: see Bevan, pp.185 to 188; Kenny, p.17; R. v Church [1966] 1 Q.B. 59. Cf. R. v Lowe [1973] 1 All.E.R. 805.

28 21 Jac. 1, c.27.

29 Act anent murdering of children passed in the second session of the first Parliament of Mary and William, c.50.

30 49 Geo. 3, c.14. Hume, Commentaries, 1.293 regarded the 1809 Act as substituting a presumption of culpable homicide for the presumption of murder contained in the 1690 Act.

31 Gordon, p.753.

32 E.g. a letter subsequently destroyed: H.M.A. v Gall (1856) 2 Irvine 366.

interpretation of the Act, in accordance with the doctrine of strict interpretation of penal statutes.³³ It is an interpretation not wholly consistent with the doctrine of the welfare of the child.

12.11 The offence of concealment of birth in England has since its enactment been supported by further legislation,³⁴ namely the Infant Life (Preservation) Act 1929³⁵ and the Infanticide Act 1933.³⁶ Concealment of birth is concerned with peri-natal death. On the other hand, infant life preservation (or child destruction), which has an affinity with abortion, is concerned with ante-natal "death"; and infanticide with post-natal death. In England therefore all three possible sets of circumstances are covered by legislation. The various Acts define the offences fairly comprehensively; any problems arising are likely to be factual. The courts have rarely had an opportunity to analyse the legal intricacies of these statutory provisions.

12.12 Once the birth of the child and thus his existence have been established, the way may be open to apply the

33 Gordon, pp. 753 to 756.

34 Partly because of the narrow nature of the statutory provisions; Bevan, p.185; Kenny, pp. 183 and 189.

35 19 & 20 Geo. 5, c.34. Generally, see Bevan, pp. 183 and 184 and Kenny, p. 188.

36 1 & 2 Geo. 6, c.36. Generally, see Bevan, pp. 184 and 185 and Kenny, pp. 187 and 188.

37

normal law of homicide. On the other hand, there may be considerable argument about whether and to what extent a child may be said to exist before birth for the purpose of the legal protection of his welfare, assuming always that there is a relevant aspect of welfare to be protected. Child destruction, which should be considered along with abortion, may be legitimate if the act causing death was done in good faith for the purpose only of preserving the life of the mother. Assuming that an embryo has an existence whose welfare may be protected, such a provision introduces a second interest which must be taken into account. The same is true of abortion.

Section 5 - Abortion.

38

12.13 The Abortion Act 1967 has been superimposed upon the common law offence of abortion in Scotland and upon section 58 of the Offences against the Person Act 1861 in England. These offences protect the embryo only, subject to the doctrine of necessity postulated in R. v Bourne, at least for England. The 1967 Act has forced the recognition of further interests. The existence of the crime of abortion

37 E.g. H.M.A. v Scott (1992) 19 Rettie (J.) 63 where a woman was charged with culpable homicide of the child soon after delivery. Alternatively, she was charged with refraining "from calling for assistance when the time of her being delivered had arrived, in consequence whereof the child died." Lord Young at pp.64 and 65 declined to hold that the alternative charge was recognised by the common law although such circumstances could if proved amount to culpable homicide.

38 1967 c.87. 39 Gordon pp. 757 to 758.

40 As amended by the Criminal Justice Act 1948 (11 & 12, Geo 6, s.1. For the history of abortion law in England, see c.58) Bevan, pp. 179 and 180: see also Kenny, pp. 189 and 190.

41 [1939] 1 K.B. 687.

itself would seem to protect the mental and physical integrity of the unborn child so that eventually that child will have the benefit of all the other legal advantages conferred upon children and ultimately adults. The introduction of lawful termination of pregnancy would seem to some extent to cut across that principle. By doing so, the legislature has probably reached a social judgment which attributes greater weight to the protection of interests other than those of the unborn child. On the other hand, an unwanted child, a potential candidate for abortion, may be at an extreme disadvantage after he has been born.⁴² In a sense therefore it may be of advantage to an unwanted child not to be born at all. This is an extreme hypothesis which is probably beyond proof or disproof. It indicates, however, even on a purely hypothetical plane, that there may be a variety of interests relevant to the question of abortion.

12.14 Of the two relevant statutory grounds of lawful termination, one permits abortion if there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.⁴³ This is an application to abortion of the welfare principle in the following sense. The original offence of abortion probably amounted to no more than conferring upon the unborn child a right to life of

42 See a letter to the Times dated 28 March 1972 from Professor Clanville Williams citing the study of Forssman and Thuwe in 1966.

43 Abortion Act 1967, s.1(1)(b).

unprescribed quality; or, in welfare terms, it merely recognised that the welfare of the child favoured life rather than the absence of life. Section 1(1)(b) of the 1967 Act introduced a qualitative dimension to this principle. It is better for the unborn child to be born alive; but if the child were to suffer from serious physical or mental handicaps, the welfare test would point to the alternative conclusion that it would be better for the child not to survive. There are thus two dimensions of welfare for consideration: one largely a matter of principle; the other essentially a matter of fact. Prognosis of the likely condition of a child after birth is unquestionably a difficult matter. The decision is conferred by the Act upon two registered medical practitioners;⁴⁴ it is difficult to see how the courts could become substantially involved in such a matter.⁴⁵

12.15 The other ground of lawful termination of pregnancy, set out in section 1(1)(a) of the 1967 Act, introduced not an extended notion of welfare but rather a new welfare-interest protected by the offence of abortion. Paragraph (a) allows abortion if the continuance of the pregnancy would involve risk of injury to the physical or mental health of any existing children of the family of the pregnant woman greater than if the pregnancy were not terminated. The child whose

⁴⁴ Abortion Act 1967, s. 1(1).

⁴⁵ See also Bevan, p. 182.

health is thus protected is not the unborn child in utero but any other existing child of the mother. The welfare of the unborn child, including its life, thus depends to some extent upon the welfare of another child, normally a sibling.⁴⁶ As in the case of the other ground, the substantive decision is effectively given to two medical practitioners.⁴⁷ No doubt it would be a medical decision of extreme delicacy with which the courts are again unlikely to interfere on the merits.

12.16 The scope of that ground of termination of pregnancy is determined to some extent by the meaning of "any existing children of her family."⁴⁸ Bevan has drawn attention to the problems of interpreting that phrase. It is probably a mixed issue of fact and law. He has called for a wide construction of the provision. In the event of ambiguity, there are, of course, strong arguments favouring such a construction and Bevan has put forward the novel suggestion that the test of the relationship should be the child's dependence on the woman, not the age of the child.⁴⁹ This stresses the "family" aspect of the relationship, which is not one normally afforded much weight by the courts in this context. The 1967 Act thus illustrates in an unusual way how the interests of children may be recognised and protected by statute.

⁴⁶ But probably not necessarily so.

⁴⁷ Abortion Act 1967, s. 1(1).

⁴⁸ Bevan, p. 182.

⁴⁹ Bevan, p. 183.

CHAPTER 13

THE CONTRIBUTION OF THE COMMON LAW

Section 1 - Introduction

13.1 Section 1 of the Children and Young Persons Act 1933¹ was introduced to overcome some of the problems of the common law. To some extent the statutory provisions complement the common law². The 1933 Act does not, however, replace the common law offences and there is no doubt that the common law has a role to play in the protection of the well-being, particularly in the physical sense, of children in a way very similar to the criminal offences created by statute. This part³ as a whole deals especially with the way in which Acts of Parliament protect and promote welfare. This chapter in particular deals with analogous common law approaches. No apology is made for switching the emphasis away from enacted law, for to ignore the common law aspect would be a serious defect in the overall analysis. It is convenient to look at the common law now.

13.2 The Table on page 378 was designed to illustrate the rather narrow range of persons guilty of, or at least charged with, offences against children. It also demonstrates a number of other points. Part B of that Table, for example, shows that culpable homicide and manslaughter are not uncommon.

1 23 & 24 Geo. 5, c.12. More correctly, the changes were made by the provisions from which section 1 was derived.

2 Bevan, p.186; Kenny, p.17.

3 I.e. chapters 11 to 13.

They probably attract no special difficulty when the victim is clearly beyond the stage of newly-born. Death of the child may, of course, occur even where the charge is a non-homicidal offence.⁴ Moreover Part A of the Table clearly suggests that non-statutory offences, particularly assault⁵ and causing grievous bodily harm,⁶ are often committed against children. The unsubstantiated impression is that the prosecutors in England rely on the common law more than their Scottish counterparts. This is perhaps surprising in view of the more imaginative approach of the Scottish judiciary during the nineteenth century.⁷ An analysis of the Scottish common law is not merely of antiquarian interest, for it demonstrates the fundamental similarity of approach of both common law and statute law in Scotland.

13.3 Even before the intervention of statute the law was able in certain circumstances to protect the interests of children; admittedly the circumstances were probably more restricted than those contemplated by statute, especially in England. In the case of acts of commission there could be little difficulty in relation to children whose formal existence was not in doubt. Allegations founded upon acts of omission

4 E.g. R. v Watson and Watson (1959) 43 Cr. App. Rep. 111; R. v Lowe [1973] 1 All E.R. 805; Horwood [1971] The Scotsman, 19 March and 6 April; Macauley [1971] The Times, 2 June. There are many other examples.

5 E.g. Murray [1972] Edinburgh Evening News, 30 March; Simpson [1974] The Scotsman, 21 August.

6 E.g. Drewery [1974] The Times, 25 April; Chand [1974] The Times, 13 June; Panchkowree [1974] The Times, 20 July.

7. Chapter 33.

could cause problems. But even the common law of England recognised the offence of parental failure to provide for his child. For example, any person failing to implement the duty resting upon him to supply the child with food and clothing so that the child died could well be guilty of murder or manslaughter.⁸ Current practice on the other hand would seem to suggest charging such offences as neglect or some other ground under the 1933 Act, even where death of the child results. Breach of the statutory duty may equally be an element in the foundation of a possible charge of homicide in the event of death.⁹ The validity of these common law procedures cannot be questioned.

13.4 Common law assault was also a weapon in the armoury of the nineteenth century English prosecutors. Thus putting a child in a bag and leaving it hanging on palings¹⁰ or exposing a child to the inclemency of the weather¹¹ were treated as assault. But the absence of inconvenience or injury would probably avoid that consequence.¹² Leaving a child in a dark room but without shutting him in would not be assault,¹³ although the view has been expressed that it might be neglect or ill-treatment.¹⁴ Most modern examples of assault or causing bodily harm do not attract these difficulties; they are usually cases of fractured limbs or skulls, broken ribs, bruises or burns.¹⁵ In

8 R. v Bubb; R. v Hook (1850) 4 Cox C.C. 455; Bevan, pp. 175 and 176; Kenny, p.132.

9 Bevan, p.186.

10 R. v March (1844) 1 Carrington & Kirwan 496.

11 R. v Ridley (1811) 2 Campbell 650.

12 R. v Renshaw (1847) 2 Cox C.C. 285.

13 R. v Smith (1826) 2 Carrington & Payne 449.

14 Clark Hall & Morrison, p.14.

15 E.g. Cooke [1974] Daily Telegraph, 12 July; Chand [1974] The Times, 13 June; Smith [1974] The Times, 13 June; Panchkowree [1974] The Times, 20 July; Johnson [1974] The Times, 8 November.

such cases the problems are not legal, rather factual; not interpretation, rather causation.¹⁶ Bevan, nevertheless, takes the view that the common law authorities are now weak.¹⁷ That may be so, but they have a part to play particularly in the more straightforward acts of commission. The more problematical cases, including neglect, are thus more likely to be dealt with under the legislation.

13.5 The pattern for Scotland is fundamentally similar. The information in the Table suggests that murder is very rare, but culpable homicide not uncommon. On two occasions¹⁸ where death resulted, the conduct, although charged as murder and culpable homicide, was founded upon neglect through failure to provide medical aid and the other necessities of life. On the other hand there are some instances of statutory neglect¹⁹ causing death where the prosecutor was content to allege a breach of section 12 of the Children and Young Persons (Scotland) Act 1937.²⁰ As in England, so in Scotland ordinary assault involves simply physical violence.²¹ There is therefore no reason to suggest that the general criminal law plays no part in protecting the welfare of children.

16 E.g. Marsh and another v Hodgson [1974] Crim. L.R. 35.

17 Bevan, p.176. See also Gordon, p.813.

18 Findlay [1971] The Scotsman, 3 April; Lockhart [1974] The Scotsman, 9 May.

19 Macaulay [1971] The Times, 2 June; Barrie [1971] The Times 30 June. Cf. the nineteenth century approach when culpable homicide would also be charged if death ensued from statutory neglect; see H.M.A. v Kemp and Kemp (1891) 3 White 17 and H.M.A. v Fraser (1901) 8 S.L.T. 416.

20 1 Edw.8 & 1 Geo. 6, c.36.

21 Murray [1972] Edinburgh Evening News, 30 March; Jackson [1974] The Scotsman, 8 March; Hislop [1974] The Scotsman, 24 September.

13.6 Section 1 of the 1933 Act and section 12 of the 1937 Act apply to children under sixteen years of age who are the objects or victims of the offence. The general criminal law necessarily applies to anyone the object of the offence. The statutory offences are thus limited by the terms of the enacting provisions, whereas the approach of the common law in that respect is more flexible. One of the problems is that while statute has defined what groups or classes of persons may be subject to the offence, the common law tends to apply more restrictively to any responsible person who has assumed the care of an incapax.²² The common law of England does not seem to have evolved many offences peculiarly related to children and their parents. The Scottish system on the other hand contains evidence of an imaginative approach, at least during the nineteenth century. It shows, at that stage, little of the paralysis²³ which seems to have overcome the law of England. This may be one reason why Parliament has intervened less in the criminal law of Scotland than in that of England. Too much however should not be claimed for the law of Scotland. There is plenty evidence of its difficulties.

22 Bevan, p. 175.

23 Bevan, pp. 176 and 177, where the original difficulties of providing that the neglect caused the death of the child or that the injury suffered was serious are canvassed.

13.7 The distinctive feature of the Scottish system is that the fundamental criminality of the conduct is of more importance than the nomen criminis. Whether the conduct is described as cruel and unnatural treatment, wilful neglect, confinement and imprisonment, exposure, desertion or endangering life, it operates to protect the child's well-being. It does so directly. But, just as in the case of the statutory protection of welfare, so the common law in Scotland protects the welfare of children by relying partially on the assumption that the exercise of parental rights by parents normally operates for the benefit of the children. This is tantamount to implying that the protection of parental rights equates with the protection of welfare of the children; consider, for example, abduction or plagium.²⁴ In this case welfare is protected obliquely rather than directly.

Section 2 - Cruel and unnatural treatment.

13.8 A broad approach to the criminality of conduct towards children may be demonstrated by reference to several cases. In H.M.A. v McGavin²⁵ a stepmother was charged with murder, culpable homicide, and cruel and unnatural treatment of a young child in her lawful custody. The conduct libelled habitual exposure to the cold and withholding food and clothing. The quality of such conduct as amounting to cruel and unnatural treatment was questioned. The High Court of

²⁴ Paras. 13.21 & 13.22.

²⁵ (1846) Arkley 67.

of Justiciary looked broadly at the issue, regarded the crime as "barbarous" and sentenced the offender to transportation for seven years. The issue in H.M.A. v McIntosh²⁶ was much the same. The child's paid foster mother was charged with culpable homicide, culpable wilful neglect and bad treatment. The element of "bad treatment" was questioned. It was held that the gravamen of the charge was neglect to supply wholesome and sufficient food and clothing. There were sufficient facts alleged to sustain the relevance of the charge. In H.M.A. v Craw²⁷ exception was taken to the relevance of the charge of assault, cruel and unnatural treatment, and culpable and wilful neglect, largely because "nothing could be more dangerous than to violate the privacy of families, for the purpose of enforcing by penal sanctions the performance of parental duties." This attempt to keep the law out of the domestic regime almost summarily failed.

13.9 One of the features of these cases is the multiplicity of charges. If the child died, a charge of culpable homicide or murder could be added. This could happen even in the case of statutory neglect or ill-treatment.²⁸ The High Court of Justiciary avoided any involved analytical consideration of the various offences. The nature of the offences is thus deducible only from the facts of each case.

26 (1881) 8 Rettie (J.) 13.

27 (1839) 2 Swinton 449.

28 See H.M.A. v Kemp and Kemp (1891) 3 White 17; H.M.A. v Fraser (1901) 8 S.L.T. 416.

In H.M.A. v ²⁹Craw the cruel and unnatural treatment alleged by the prosecution comprised beating the child with a stick or fist and plunging the child into a barrel of cold water in cold weather. The child's arm was broken; two teeth stuck out; the body was covered with ulcers and sores. The treatment meted out to the child is probably required to be unnatural as well as cruel.³⁰ In these circumstances it would be difficult to deny that such conduct amounted to cruelty.³¹

13.10 The meaning of "unnatural", on the other hand, may create more difficulties. Probably it means conduct which would not be expected of a normal person.³² In that event "unnatural" and "cruel" are not synonymous but closely related. In H.M.A. v ³³Gemmell the conduct complained of involved confining the child in a loft or closet, with the door locked, for two months. Failure to provide clothing, food, medical supplies and assault by beating with fists or sticks were also charged; they were not, at least on the face of it, related to cruel and unnatural treatment. The charge in H.M.A. v ³⁴McGavin included beating and striking the child with hands, brooms and switches, habitually exposing her to cold and withholding food and clothing. There was no allegation of neglect in that case. But in H.M.A. v ³⁵McIntosh neglect was included. The cruel and unnatural treatment probably comprised

29 (1839) 2 Swinton 449.

30 All the charges refer to "cruel and unnatural treatment".

31 Applying the normal meaning of the word.

32 Paraphrasing the meaning in the O.E.D.

33 (1841) 2 Swinton 552. 34 (1846) Arkley 67.

35 (1881) 8 Rettie (J.) 13.

feeding the child with improper and deleterious food and keeping her dirty, damp and cold. The common factor in these cases appears to be the fairly extreme character of the conduct of the alleged offenders.

13.11 The court also tended to avoid any analytical arguments about those owing a duty towards these children. Probably any person in fact responsible for and having the care of the child and so in practice answerable for what happened would be held legally liable, however remote or absent any relationship with the child.³⁶ These cases tended to emphasise positive misconduct on the part of the accused rather than elements of neglect, thus reducing the importance of the relationship between offender and victim. The Scottish courts thus look to the conduct of the offender rather than his affinity with the child. The overall impression is that the conduct of the accused must be fairly "robust" to amount to cruel and unnatural treatment and in turn the attitude of the court towards the legal requirements of the offence is founded largely upon judicial common sense.³⁷ It is understandable why contemporary prosecutors prefer to charge offenders with precise statutory offences rather than grapple with abstruse common law.

36 E.g. in H.M.A. v Kemp and Kemp (1891) 3 White 17 the accused were the child's mother and father; in H.M.A. v Fraser (1901) 8 S.L.T. 416 the child's father; in H.M.A. v McGavin (1846) Arkley 67 the child's stepmother; in H.M.A. v McIntosh (1881) 8 Rettie (J) 13 the child's foster mother; in H.M.A. v Craw (1839) 2 Swinton 449 the child's mother and father; and in H.M.A. v Gemmell (1841) 2 Swinton 552 the child's father and stepmother.

37 See generally Gordon, p.780.

13.12 An unusual case in this context is H.M.A. v Watt and Kerr³⁸. The accused were charged with cruel and barbarous usage of several boys who had stowed away on board ship. The conduct comprised withholding necessary food and nourishment, striking and beating the boys with fists and ropes, kicking, putting the boys in irons, stripping them naked in cold weather and pouring cold water over them. It may reasonably be asked how the offence of cruel and unnatural treatment differs from cruel and barbarous usage. The latter is presumably more reprehensible³⁹. It is difficult to see how the conduct alleged in H.M.A. v Watt and Kerr⁴⁰ would not amount to cruel and barbarous usage. However, it was held irrelevant. It should be recalled that the accused were master and mate of the ship. The children were, of course, stowaways. Perhaps it is questionable whether that gives to the master and mate any greater rights, particularly in relation to children.

13.13 The alternative charge of compelling the boys to leave the ship was sustained and held proved. This is the odd feature of the case. It could have been expected that such a charge would constitute the facts of the offence, but not the offence itself. But, without much discussion or analysis, the High Court of Justiciary accepted the validity of the offence of compelling persons to leave a ship. Lord

38 (1868) 1 Couper 123.

For a journalistic account of the case, see Roughead, "The boys on the Ice" (1939) 51 Juridical Review 28.

39 Because the conduct would appear to be more extreme.

40 (1868) 1 Couper 123.

Patton L.J.-C., on the other hand, attempted to justify the decision holding the charge of cruel and barbarous usage irrelevant:-

"There is not a sufficient affirmance of a positive duty incumbent on the accused, nor even of such relationship between the parties as to rear up a duty by implication. The fact of the panel's having authority on board the ship and of the other parties being on board is not enough. There may be persons on board over whom the master and mate have no authority, and such parties may have no special claim for the performance of any duty on the part of these officers. The casual presence on board does not state such a relationship as brings the case within such cases, as that of husband and wife, parent and child and others that have been quoted to us; and cruel and barbarous usage of itself does not constitute a crime."⁴¹

The **essence** of that view is the lack of an appropriate relationship between the alleged offender and the victim. There is a suggestion that the presence of the boys as stowaways made some sort of difference. It may be that the master and mate did not want the responsibility of the boys. But if anyone was responsible, they were. Even if there was no relationship sufficient to sustain a charge of neglect, the facts would appear to sustain a charge of assault. Judicial reticence on this fundamental issue is regretted. The case of H.M.A. v Watt and Kerr⁴² is not free from difficulty. Its

41 Ibid. at pp. 133 and 134.

42 Ibid.

circumstances are patently exceptional; the legal position rather obscure.

13.14 One of the interesting aspects of several of these cases involving cruel and unnatural treatment is the alternative charge of neglect. Although in H.M.A. v Watt and Kerr⁴³ there was no charge of neglect, one of the facts alleged was withholding necessary food and nourishment. This would on the face of it amount to neglect, if the relationship were one supporting a duty to maintain. The cases of H.M.A. v Craw⁴⁴ H.M.A. v Gemmell⁴⁵, H.M.A. v McIntosh⁴⁶ and H.M.A. v Kemp⁴⁷ included charges of neglect. In each of these cases there were allegations of failure to supply adequate and sufficient food; and in each case there was a sufficient relationship between the children and the alleged offenders to create a duty breach of which could constitute neglect.

13.15 There is in practice a fairly close affinity between the common law offences of cruel and unnatural treatment and neglect. This is not surprising since there is a clear substratum of substance between them. Neglect is a fairly flexible and indeterminate offence. It can cover a wide range of circumstances. Cruel and unnatural treatment is a more definite concept, although it too is reasonably comprehensive in nature. It may be that cruel and unnatural treatment could be co-extensive with the circumstances of neglect if neglect amounts to failure to implement a legal obligation. The substance

43 Ibid. 44 (1839) 2 Swinton 449. 45 (1841) 2 Swinton 552.
 46 (1881) 8 Rettie (J) 13. 47 (1891) 3 White 17.

of the obligation may differ, even if the analysis is the same. In that event the obligation in relation to cruel and unnatural treatment would be to protect and sustain the physical, emotional and mental integrity of the child.

Section 3 - Endangering and imprisoning a child.

13.16 The same conclusion also applies to other common law offences which have the effect of protecting the welfare of the child. The protection may however be weaker and less obvious. In H.M.A. v Rachel Gibson⁴⁸ the accused was charged with wickedly and feloniously exposing and deserting her small child only two weeks after being delivered of the infant. She was also charged with wickedly, wilfully and feloniously placing the infant child in a situation of danger to the child's life. The offence comprised enclosing the child in a basket, covering the basket with cotton wrap, addressing it and conveying it from Glasgow to Ayr as a parcel without telling anyone of its contents. The charges were held relevant. These facts certainly seem to support the allegation of endangering the child's life. It is perhaps less clear how they amount to exposure and desertion. It may be asked - exposure to what? If it were exposure to danger to life, there would be little difference between that offence and actually endangering life. It is equally questionable in what sense the circumstances amount to desertion. The facts suggest that the parent sent away rather than left the child; they may however be covered by a flexible concept of desertion.

48 (1845) 2 Broun 366.

13.17 The decision in H.M.A. v Jane Thom⁴⁹ is more straightforward. The mother allegedly threw the child from a railway carriage in motion. The charge was endangering the child's life and assault to the danger of life. The only contention was whether there was danger to life in the absence of actual injury.⁵⁰ The court decided that actual injury was not necessary. In the event the charge was not proved but its competency was not successfully challenged. There would seem therefore to be little doubt that it is an offence at common law for a child to be treated in such a way that his life is endangered. Mere possibility of injury is sufficient. Such an offence clearly has the effect of protecting the physical welfare of the child.

13.18 The last common law offence which directly protects welfare is confining and imprisoning the child. The classic instance is H.M.A. v Fairweather.⁵¹ A child was apparently kept in a cage or crib constructed for the purpose in a barn or outhouse. It was four feet ten inches long, two feet nine inches wide, four feet nine inches high, at the highest point, and two feet six inches high at the lowest point. She was there for some three weeks. There was neither fire nor warmth. The child's life was endangered and she was reduced to almost total idiocy. The validity of the charge was not challenged. There would seem little doubt that these circumstances constitute confinement or imprisonment. There are obviously elements of cruel and unnatural treatment, endangering life and neglect. The flexibility and inter-

49 (1876) 3 Couper 332. 50 Cf. the common law of England: Bevan, p. 176.
 51 (1842) 1 Broun 309.

changeability of these several offences are thus emphasised.

13.19 The charges in H.M.A. v ^{5 2}Gemmell, it will be recalled, were culpable homicide, cruel and unnatural treatment, and wilful and culpable neglect. One of the allegations was that the child was confined in a loft or closet, with the doors locked, for two months. The technicalities of the indictment suggest that the allegation of confinement formed the species facti of one of the charges, probably cruel and unnatural treatment. This point was not specifically raised or decided. The accused pleaded guilty to the main charge but did not admit the allegation of confinement. It is presumed that in these circumstances the confinement issue was dropped and sentence passed in relation to the charges to which the plea of guilty was made.

Section 4 - Parental rights approach.

(a) Scotland.

13.20 The offences of confinement and imprisonment, as in H.M.A. v ^{5 3}Fairweather and in H.M.A. v ^{5 4}Gemmell, in common with most of the other common law offences, protect the child from reprehensible parental conduct. The accused in both cases were husband and wife, of whom at least one enjoyed a formal relationship with the child. The persons to whom these these several offences apply have not been authoritatively determined and it may be that they do not relate to a third

52 (1841) 2 Swinton 552. 53 (1842) 1 Broun 309.

54 (1841) 2 Swinton 552.

⁵⁵ party maltreating or otherwise detrimentally affecting the child. The reason may be that the common law protects the child from illegal conduct on the part of a parent or other person either undertaking the duty of care or upon whom legal obligations towards the child have been imposed. If the law intervenes to protect a child from a third party, the rationale is probably to enforce or sustain the parent-child relationship rather than to protect the child directly. The ⁵⁶ assumption underlying that rationalisation is that it is to the child's advantage for the relationship between the child and his parent to be preserved and continued. It reflects a parental rights approach rather than a welfare approach.

13.21 So far as Scotland is concerned, parental rights in the child are protected by the common law crime of plagium.⁵⁷ It is neither an obsolete nor even an obsolescent offence; in 1974 a grandmother admitted stealing her three year old granddaughter from her son's home.⁵⁸ In H.M.A. v Cook and Cairney⁵⁹ the accused were charged with "stealing" a girl aged eight in the legal custody of her grandfather. One of the accused was also charged with "detaining and secreting" the girl, knowing her to have been stolen. Objection was taken to the competency

55 I.e. someone without a formal relationship with the child.
 56 The position is similar in relation to some of the statutory offences.

57 Generally see Hume, Commentaries, i.84; H.M.A. v Wade (1844) 2 Brown 288; H.M.A. v Millar or Oates (1861) 4 Irvine 74; H.M.A. v Cook and Cairney (1897) 5 S.L.T. 254; Gordon, p.430. Cf. Gordon, p.781.

58 McHugh [1974] The Scotsman, 23 September.

59 (1897) 5 S.L.T. 254.

of the second charge. The argument was that "the child being over the age of seven, when in criminal law a child became capable of exercising a will,⁶⁰ the indictment should set forth that the acts done were against her will."⁶¹ The court rejected this argument, pointing out that plagium, may be committed on any child under the age of puberty and that it was not necessary to state that the taking was against the child's will.⁶² For the purposes of plagium, therefore, the child is regarded as a mere object, almost as a piece of property belonging to the parent and liable to theft and reset.

13.22 Gordon takes the view that abduction for any purpose is criminal.⁶³ For this purpose he treats abduction as the deprivation of the victim of his personal freedom. This presumably includes the abduction of minors. Plagium, on the other hand, applies only to the abduction of pupils in the sense of their removal or theft. It was suggested in Abinet v Fleck,⁶⁴ an action of damages for wrongous apprehension of a girl between seventeen and eighteen, that "the abduction of a girl between seventeen and eighteen was not a crime at common law, and was so under the seventh section of the Criminal Law Amendment Act 1885, only if the intention was that she should be unlawfully known."⁶⁵ If this is so, then,

60 Hume, Commentaries, i.35. 61 (1897) 5 S.L.T. 254 at p.254.

62 Idem., at least according to the reporter's note. These principles were also established in H.M.A. v Millar or Oates (1861) 4 Irvine 74. Gordon, p. 430, also points out that if the child were removed by force, that would constitute a further crime, in that case not against the parent but against the child himself.

63 Gordon, p. 781. 64 (1894) 2 S.L.T. 30.

65 Idem., at least according to the reporter's note.

unless some statutory provision is relied upon, abduction of any person over puberty would not be an offence. Indeed in H.M.A. v Millar or Oates⁶⁶ a charge of "abduction" of a pupil was withdrawn by the prosecution. Gordon's view is thus perhaps questionable, but in practice, if attention is paid not to abduction but to the effect of abduction, namely the deprivation of liberty, the circumstances contemplated by Gordon may constitute the common law offence of confinement or imprisonment.

(b) England.

13.23 In England, by comparison, the common law is probably much weaker than in Scotland and, consistently with general trends, English law now relies heavily upon statute.⁶⁷ There is some doubt whether the common law offence of kidnapping protects the child's interest or the parent's right. According to East, kidnapping is "the stealing and carrying away or secreting of some person."⁶⁸ It cannot be deduced from that proposition whose interest is being infringed. The most recent decision is R. v Hale.⁶⁹ One of the allegations there was that the accused had "unlawfully secreted a girl aged thirteen years, against the life of her parents and lawful guardians." This is reminiscent of the Scottish offence of confining and imprisoning a child.

66 (1861) 4 Irvine 74.

67 Bevan, p. 201.

68 Pleas of the Crown (1803), vol. 1, pp. 429 and 430.

69 [1974] 1 AllE.R. 1107.

Lawson J. held that the particulars of that allegation, in the absence of any suggestion that the girl had been taken or secreted by force or fraud or against her will, disclosed no common law offence.⁷⁰ The reasoning of Lawson J. appears to suggest that kidnapping tended to protect the child's interests rather than those of the parent. The charge of kidnapping in R. v Hale⁷¹ was therefore quashed.

13.24 Earlier convictions in England for kidnapping were explained by Lawson J. in these words:-

"It is, of course, true that there are many old cases in which consenting minors have been removed from their homes and parents, in the context of subsequent forced or fraudulent marriages, or unlawful sexual intercourse, but these cases all appear to have been dealt with as offences of conspiring against public morals, or in the case of females, of abduction or conspiracies to abduct. The present case has none of those features There are also older authorities which deal with offences of 'kidnapping', either as a common law misdemeanour or as crimes against old statutes, no longer in force. These appear to present an element of removing a person from this country⁷² The kidnapping cases to which I have referred also present elements of force or fraud, and, as far as I have been able to discover, in the absence of one or other of those elements the case of a consenting victim does not seem to have been adjudicated on by the English courts. The vital point in the present case is that count 1 does not allege that the named girl was taken or secreted by force or fraud or against her will."⁷³

-
- 70 In People (Attorney-General) v Edge [1943] I.R. 115 the Supreme Court of Ireland had by a majority come to a similar conclusion in relation to the kidnapping of a boy aged fourteen and a half. 71 [1974] 1 All E.R. 1107.
- 72 A recent example of this, not referred to by Lawson J., would seem to be Pinney [1970] Daily Telegraph, 9 September. Dr. Pinney pleaded guilty to unlawfully keeping and maintaining a boy of fourteen out of England against the will of his mother.
- 73 [1974] 1 All E.R. 1107 at pp. 1108 and 1109. per Lawson J.

The decision of Lawson J. thus considerably restricts the nature of the offence of kidnapping. This means that prosecutors will be even less inclined than previously to rely on the common law.⁷⁴ On the other hand in Scotland plagium can be effective within its own context; it is relatively simple and straightforward.

13.25 Against this background it is not surprising that Parliament intervened. Child-stealing was first proscribed in 1814.⁷⁵ It is now dealt with by section 56 of the Offences against the Person Act 1861.⁷⁶ That section requires force or fraud,⁷⁷ an aspect to which Lawson J. drew comparative attention in R. v Hale⁷⁸ considering the common law offence of kidnapping. He stated:-

"But the use of force or fraud is a necessary ingredient of this [statutory] offence as well as the existence of one of the specific intents which are referred to in the section. Where a child is harboured with its own consent or at its own instigation, and the statutory elements of the offence are lacking, it is clear that the section has no operation."⁷⁹

Baby-snatching appears to be a not uncommon occurrence now and section 56 will probably be the basis for any charge against the alleged offenders.⁸⁰ Since permanent removal from the parent or other person in loco parentis is not necessary⁸¹

74 E.g. in Henry [1974] The Times, 19 March the judge directed that a charge of kidnapping should be dropped and the accused pleaded guilty to child-stealing.

75 54 Geo. 3, c.101.

76 As amended by section 83(2) and (3) and Schedule X, Part I of the Criminal Justice Act 1948. 77 Bevan, pp.201 to 203. 78 [1974] 1 AllE.R. 1107. 79 [1974] 1 AllE.R. 1107 at p. 1108 per Lawson J.

80 E.g. Whitfield [1974] The Scotsman, 23 August; probably also A girl aged 11 [1974] The Times, 12 November.

81 R. v Powell (1914) 24 Cox C.C. 229.

and the force or fraud may be perpetrated against the parent as well as against the child,⁸² the section has been fairly liberally interpreted and is appropriate to cover a wide variety of circumstances.

13.26 On this basis there is a great deal of common ground between kidnapping and statutory abduction. The Sexual Offences Act 1956 contains a number of provisions intended to protect children in a purely sexual context.⁸³ As abduction may frequently be sexually motivated, the 1956 Act may be the appropriate legal machinery to prosecute certain alleged abductors. Section 20, however, exceptionally does not stipulate any purpose. Any person acting without lawful authority or excuse who takes an unmarried girl under sixteen out of the possession of her parent or guardian against his will commits an offence. This probably constitutes the simplest offence of abduction in English law. It is a wide offence, but concisely drafted. Even so, it is restricted by its own terminology. For instance, in R. v Jones⁸⁴ it was decided by Swanwick J. that the concept of taking out of the possession and against the will of the parent required conduct involving a "substantial interference with the possessory relationship of parent and child."⁸⁵ Jones' unsuccessful attempt to have two small girls to go for a walk with him did not amount to an attempt to breach that possessory relationship. Section 20 does not therefore comprehensively cover all the circumstances in which a girl under sixteen may leave or be removed from her parents.

82 R. v Bellis (1893) 17 Cox C.C. 660.

83 No detailed analysis is necessary here: the ground has been concisely covered by Bevan, pp. 219 to 235.

84 [1973] Crim. L.R. 621. 85 Ibid., at p. 622.

13.27 These various offences, plagium, confinement and imprisonment in Scotland and kidnapping and the statutory offences of abduction in England, have the effect of protecting the child's physical integrity, albeit indirectly, and his relationship with his parents or other custodians. It is probably a matter of debate which objective inspires each offence but the tendency in Scotland, particularly in the context of plagium, and of the statutory offences in England appears to be founded upon a parental rights approach. This is entirely reasonable so far as the retention and continuity of the parental relationship is in the child's best interest. That may be so but it will depend very much upon the circumstances. The feature of the provisions considered in this section is that they ignore the quality of the parental relationship; they seek merely to enforce it.

Section 5 - Conclusion.

13.28 There is no doubt that just as statutory offences protect the child's welfare so do common law offences. The legislation has been designed to apply specifically to children; common law offences, on the whole, apply more generally. Although the conduct proscribed by both statute and common law tends to be similar, the common law labours under the peculiar difficulty of needing to point to a sufficiently nexus between victim and offender. Arguably such a duty is unnecessary; the conduct, given its moral culpability, should be sufficient. Thus any acts of cruelty or unnatural treatment should per se be criminal. Such a view would have avoided the

difficulties in H.M.A. v Watt and Kerr.⁸⁶ On the other hand such a flexible attitude would amount almost to judicial lawmaking which, in the context of criminal law in particular, attracts a good deal of criticism.

13.29 It is unquestionably true that in practice statutory offences predominate, particularly in England, but even in Scotland much reliance is placed upon the legislation dealing specifically with children. Common law offences suffer from many of the same disadvantages as statutory offences, particularly in the sense that the criminal law depends for its contribution to the protection of children upon its effectiveness as a deterrent. But given the nature and function of criminal law, that is probably inevitable. This is not to say that the criminal law has no part to play in protecting children. The role is a subsidiary one; it backs up a whole series of other remedies and methods of regulation and control.⁸⁷

13.30 Although the common law offences are probably less precise than the statutory offences, each system approaches the protection of children in terms of similar concepts; those of neglect, abandonment, exposure, ill-treatment. The more general concepts, homicide, assault, causing bodily harm, apply more generally; yet they are relevant to the protection of children in appropriate circumstances. The protection

⁸⁶ (1868) 1 Couper 123.

⁸⁷ They are dealt with in Part 5.

afforded by the criminal law has been considered in some detail. It operates in terms of specific offences; some are wider or narrower in essence than others. The system does not operate in terms of welfare itself, simply because it is inconceivable that it should do so. Parliament would never be expected to declare that any person acting contrary to the best interests of a child shall be guilty of an offence. Such a provision might be effective if very comprehensive and efficient investigation, evaluation and prosecution services were available; the whole range of professional expertise from the police, social workers to doctors and lawyers would be needed. Even so, the concept of "best interests" would be so general and indeterminate that the scope for debate would be infinite, apart from any allegations that such an approach would be draconian. Such a system would be impracticable in the foreseeable future. However, the stark comparison between such an approach and the present protection of children through the criminal law emphasises the nature of the present system. The criminal law, statutory or common law, proscribes conduct meted out to children in a fashion that is largely both direct and objective. The degrees of directness and objectivity vary according to the context. Discretion, except interpretational discretion, is absent from the criminal law, in relation to the courts, the children or the parents. The only qualification is the power of the prosecutor to proceed or not. That type of discretion is unrelated to the present context which is concerned with the operation of the law within the judicial process.⁸⁸

88 The prosecutor's discretion is considered in paras.19.23 to 19.33.

TABLE

<u>Offence</u>	<u>Persons Charged</u>	<u>Court</u>	<u>Newspaper</u>	<u>Date</u>
<u>Part A - Non-homicidal Offences:-</u>				
1 Abandonment	Mother	Ipswich Crown	Scotsman	25.05.74
2 Abandonment	Mother	Glasgow Sheriff	Scotsman	19.09.74
3 Assault	Paramour of mother	Glasgow Sheriff	Edinburgh Evening News	30.03.72
4 Assault	Mother	Glasgow Sheriff	Scotsman	08.03.74
5 Assault	Mother	Aberdeen Sheriff	Scotsman	21.08.74
6 Assault	Father	Glasgow Sheriff	Scotsman	24.09.74
7 Grievous bodily harm	Mother	Lincoln Crown	The Times	25.04.74
8 Grievous bodily harm	Father	Leeds Crown	Daily Telegraph	12.07.74
9 Grievous bodily harm	Father	Birmingham Crown	The Times	13.06.74
10 Grievous bodily harm	Mother	Nottingham Crown	The Times	13.06.74
11 Grievous bodily harm	Mother	Central Criminal	The Times	20.07.74
12 Ill-treatment and cruelty	Mother and Father	St. Albans Crown	The Times	23.05.74
13 Ill-treatment and cruelty	Matron of Home	Lewes Crown	The Times	24.07.74
14 Cruelty and bodily harm	Father	Chichester Crown	The Times	19.09.74
15 Cruelty and bodily harm	Father	Nottingham Crown	The Times	08.11.74
16 Neglect	Mother and Father	Central Criminal	Scotsman	19.03.71 and 06.04.71
17 Neglect	Mother and Father	Glasgow Sheriff	The Times	02.06.71
18 Neglect	Mother and Father	Glasgow Sheriff	The Times	03.06.71

19	Neglect	Mother	Glasgow Sheriff	The Times	30.06.71
20	Neglect	Mother	Dumfermline Sheriff	Scotsman	10.11.71
21	Neglect	Father	Glasgow Sheriff	Scotsman	05.10.72
22	Neglect	Father	Perth Sheriff	Scotsman	19.06.74
23	Neglect	Mother and Father	Glasgow Sheriff	Scotsman	27.07.74 and 13.08.74
24	Neglect	Mother and Father	Glasgow Sheriff	Scotsman	07.08.74

Analysis:

Mother	9
Father	7
Mother and Father	6
Others	2
Total ¹	<u>24</u>

Part B - Homicidal Offences:-

1	Culpable homicide	Father	High	Scotsman	09.11.72
2	Culpable homicide	Mother	High	The Times	29.05.74
3	Culpable homicide	Mother	High	Scotsman	15.06.74 and 27.06.74
4	Culpable homicide	Mother	Edinburgh Sheriff	Scotsman	22.06.74 and 02.07.74
5	Manslaughter	Third Party	Reading Crown	The Times	18.07.73
6	Manslaughter	Paramour of Father	Teesside Crown	The Times	26.10.74

1 Of this total 13 were Scottish cases and 11 English.

7	Manslaughter	Third Party	Stafford Crown	The Times	20.07.74
8	Manslaughter	Mother	Reading Crown	The Times	26.10.74
9	Manslaughter	Father	Sheffield Crown	Scotsman	30.11.74
10	Manslaughter	Mother	Central Criminal	The Times	09.11.74
11	Manslaughter	Mother	Central Criminal	The Times	09.11.74
12	Murder	Father	High	Scotsman	03.04.71
13	Murder	Father	Central Criminal	The Times	13.06.74

Analysis:

Mother	6
Father	4
Others	3
	<hr/>
Total ²	13
	<hr/> <hr/>

Part C - All Offences:-

Analysis:

Mother	15
Father	11
Mother and Father	6
Others	5
	<hr/>
Total ³	37
	<hr/> <hr/>

2 Of this total 5 were Scottish cases and 8 English.

3 Of this total 18 were Scottish cases and 19 English.

CHAPTER 14.OFFICIAL CARE THRESHOLD REQUIREMENTS: THE ADMINISTRATIVE REGIME.Section 1 - Introduction.

14.1 The principal disadvantage of the criminal law in relation to the protection of children lies in its retrospective quality. Unless it is going to be effective as a deterrent, the criminal law is largely restricted to imposing penalties on the offender after the offence has taken place. The criminal law, in other words, contains no mechanism for preventing the injury or harm against which it is the policy of the legislation to protect the child. Even if it were possible to seek an injunction or an interdict from the court against the parent who is likely to be guilty of criminal abuse towards the child, the procedural and evidential problems would make that type of remedy hopelessly impracticable. These difficulties existed long before the emergence of the welfare doctrine and Parliament has reacted from time to time by conferring certain, at first very limited, functions upon identifiable agencies within the state.¹ This movement gathered momentum during the second half of the nineteenth century and, more particularly, since 1945. The tendency has been to create increasingly sophisticated techniques for protecting children from themselves and from their parents.

14.2 The legislation designed to achieve these broad policies has always tended to fall into two parts. The

¹ Paras. 14.11 to 14.16.

first describes or prescribes the situations of risk to the children against which they need protection.² It is no accident that these circumstances have a close affinity with the conceptual basis of the criminal offences created by statute or recognised by the common law. They may be justifiably regarded therefore as creating the threshold to a system for preventing the abuse of children, thus filling the gap left by the criminal law. The second part of the legislation deals with the treatment of the children after the risks of abuse or the actual circumstances of abuse have been established. The function in the first part is fundamentally adjudicative; in the second part, discretionary. But the agencies upon which these functions have been conferred do not fall into that classification. Executive agencies, for example, may be required not only to determine whether the threshold requirements have been met³ but also to decide what should be done with the child thereafter. That is true also of judicial agencies.⁴ There are, of course, policy reasons underlying these differences.⁵ This analysis is concerned more with the nature of the function than with the agency upon which it has been conferred. The evolution of the system, however, and the consequential legislation have tended to place more emphasis upon the agency rather than the function. For the sake of convenience,

2 E.g. parental inadequacy or incapacity.

3 Children Act 1948 (11 & 12 Geo. 6, c.43), ss.1 and 2; Social Work (Scotland) Act 1968 (1968 c.49), ss.15 and 16. In this chapter the former is referred to as the "1948 Act", the latter as the "1968 Act."

4 Children and Young Persons Act 1969 (1969 c.54), s.1.

5 The functions in Part III of the 1968 Act are conferred differently.

therefore, this analysis will follow the pattern of the legislation. The threshold requirements for the admission into official care will be considered first in terms of the administrative regime and then under the judicial system. It is nevertheless the same function which is being considered.

14.3 During the earlier discussion on the classification of welfare it was noted that certain statutory provisions appeared in more than one part of the Tables. For example, section 1(1)(a) and (b) of the Children Act 1948 and section 15(1)(a) and (b) of the Social Work (Scotland) Act 1968 appear in both Tables 1 and 2; section 2(1)(b) of the 1948 Act and section 16(1)(b) of the 1968 Act in Tables 1 and 4; section 3 of the Custody of Children Act 1891⁶ in Tables 1 and 3; section 1 of the Custody of Children Act 1891 in Tables 1 and 4; section 12(2) of the Children Act 1975⁷ and section 16(2) of the Adoption Act 1976⁸ in Tables 1 and 4. Compulsory measures of care under the Social Work (Scotland) Act 1968 and care proceedings under the Children and Young Persons Act 1969 also attract double classification. All of these examples prescribe the threshold requirements to be met prior to the exercise of the statutory function conferred upon the agency in question. They concern the

6 54 & 55 Vict., c.3.

7 1975 c.72.

8 1976 c.36.

criteria necessary to disqualify a parent from custody, to dispense with a parent's agreement to adoption or to deprive a parent of his parental rights. It is no coincidence that they regulate the circumstances in which a parent's rights and interest in his child may be destroyed or restricted. Whether the function is conferred upon a judicial or an administrative body, Parliament has used a similar formula. The context of each function is admittedly different, the approach, it is suggested, is for present purposes conceptually the same. Of the examples in this paragraph, those from the Children Act 1948, the Social Work (Scotland) Act 1968 and the Children and Young Persons Act 1969 comprise the official care code. In care proceedings and where compulsory measures of care are needed, the adjudicative function is given to a judicial body.⁹ On the other hand, reception into care and assumption of parental rights are matters for the administrative body and they will be considered in this chapter.

Section 2 - The formal structure of the provisions.

14.4 The formal structure of section 1(1) of the 1948 Act and of section 15(1) of the 1968 Act is clear. A duty is placed upon the local authority to receive into care a child fulfilling the threshold requirements set out in paragraphs (a) or (b) and (c).¹⁰ At the moment paragraphs (a) and (b) are

⁹ Chapter 15.

¹⁰ Paragraph (c) requires that intervention is necessary in the interests of the welfare of the child.

particularly relevant, for they set out requirements which relate directly to the objective welfare of the child. Paragraph (c) is different, as it contemplates welfare in the general and unspecified sense. There can be no doubt however that fulfilment of paragraph (c) is additional to satisfying either paragraph (a) or paragraph (b). Fundamentally, therefore, sections 1(1) and 15(1) comprise a duty exigible only in certain circumstances. They compare with care proceedings and the other examples in the preceding paragraph in the sense that threshold requirements must be satisfied but contrast with them for the latter confer a discretion rather than impose a duty. Under section 1(1) of the 1948 Act and section 15(1) of the 1968 Act the responsibility rests with an administrative rather than a judicial body.¹¹ There are other restrictions circumscribing the function of the local authority necessary to a complete understanding of the scheme of the Acts but they are not germane to this aspect of the analysis.

14.5 Paragraphs (a) and (b) of sections 1(1) and 15(1) are directed to certain fairly clear sets of circumstances.¹²

11 Lord Goddard C.J. in In re AB (An Infant) [1954] 2 Q.B. 385 at p.396 noted that the Act of 1948 "not only enables, but directs the local authority to act without an order of the court."

12 Krishnan v London Borough of Sutton [1969] 3 AllE.R. 1367 would appear to be an example of a child whose parents were prevented (for an undisclosed reason) from providing for the child's proper accommodation, maintenance and upbringing. The existence of the ground was not questioned. In In re AB (An Infant) [1954] 2 Q.B. 385 at p.394 the reason supporting the same ground was disclosed, accepted but not discussed: according to Lord Goddard C.J. "because the mother had to earn her own living as a domestic servant and there was nobody to take over the child."

The former comprehends the physical lack of a parent or guardian; the latter rather implies parental inability to provide properly for the child. What matters, of course, is not this simplistic paraphrase of the provisions, but the actual terminology of the paragraphs. There has been little or no judicial or academic discussion of the paragraphs,¹³ probably because the substantive decision remains with the local authority, with little scope for intervention by the courts. Thus most legal argument has probably been confined within the offices of the local authority's legal advisers.

14.6 The nature of the function conferred upon the local authority by section 2(1) of the 1948 Act and section 16(1)¹⁴ of the 1968 Act is different.¹⁵ Parental rights and duties may be assumed by resolution of the local authority, subject to a form of judicial review.¹⁶ These sections are in several respects different from sections 1 and 15. It is however convenient for present purposes to consider them together. Both contain administrative functions; one mandatory,¹⁷ the other discretionary.¹⁸ Both are circumscribed by threshold requirements. These requirements are in some respects similar.

13 Judicial decisions on the legislation tend to take for granted the existence of the ground and thus the facts of any reported case merely illustrate without defining or analysing the legal concepts. This has inhibited academic discussion of this aspect. What discussion there is, however, is accounted for in the following paragraphs.

14 As substituted by the Children Act 1975, s.57.

15 As substituted by the Children Act 1975, s.74.

16 1948 Act, s.2(5); 1968 Act, s.16(8).

17 1948 Act, s.1; 1968 Act, s.15.

18 1948 Act, s.2; 1968 Act, s.16.

Sections 2 and 16 apply only to a child who has been received into care under sections 1 and 15 respectively.

The scope of the power to assume parental rights and duties was widened in 1975 when voluntary associations were given in certain circumstances a statutory status in relation to children in their care similar to that of local authorities.¹⁹ Voluntary associations are liable to be deprived of their status at the instance of the local authority.²⁰

14.7 The English and Scottish versions of the provisions remain largely identical; the differences tend to be matters of drafting than of substance. The grounds of assumption of parental rights were extended in 1963.²¹ The 1968 Act set out all the grounds for Scotland; the 1975 Act does likewise for both systems. It will be recalled that sections 1 and 15 contain two generic grounds: physical lack of a parent or guardian and parental inability to provide properly for the child. There are three generic grounds in sections 2 and 16: physical lack of a parent or guardian, incapacity to care for the child²² and unfitness to have the care of the child.²³ A

19 1975 Act, s.60; 1968 Act, s.16(1)(b) as substituted by 1975 Act, s.74.

20 1975 Act, s.61; 1968 Act, s.16A inserted by 1975 Act, s.75.

21 Children and Young Person Act 1963 (1963 c.37), s.48.

22 Re L(AC)(an Infant)[1971] 3 AllE.R. 743 and R. v Oxford City Justices, ex parte H[1974] 2 AllE.R. 356 would appear to be examples of parents suffering from permanent disabilities.

23 In Barker v Westmorland C.C. (1958) 56 L.G.R. 267 evidence of the parent's past life was admissible to determine whether he was unfit to have the care of the child.

fourth and different ground has now been added: where the child has been in the care of the local authority for the preceding three years.²⁴

14.8 The absence of official reports of resolutions under sections 2 and 16 and of judicial determinations under subsections (5) and (8) of these sections makes discussion of these grounds difficult in any authoritative way. However, MacEwan in his article²⁵ on this matter has described three cases²⁶ illustrating the approach of the relevant sheriff to the establishment of these grounds. The cases dealt with unfitness to have care of the child²⁷ and persistent failure without reasonable cause to discharge the obligations of a parent.²⁸ Only one parent was in fact relieved of his parental rights in relation to the child. The indication is therefore that the sheriffs take a fairly strict view of the circumstances necessary to support the relevant ground. This is not unexpected, despite the fairly wide language used in relation to some of the grounds. MacEwan does not report the shrieval reasoning; it is not therefore possible to analyse the cases further.

-
- 24 1948 Act, s.2(1)(d); 1968 Act, s.16(1)(iv): as substituted by 1975 Act, ss.57 and 74 respectively. See Houghton-Stockdale Report, para. 156. The principal changes made by the 1975 Act in relation to Scotland have been discussed by Wilkinson A.B., "Children Act 1975" 1976 S.L.T. (News) 237 at p.243.
- 25 MacEwan J.N.S. "Powers and Duties of Local Authorities with regard to Children" 1971 S.L.T. (News) 89.
- 26 *Ibid.*, pp.90 and 91.
- 27 1968 Act, s.16(1)(b)(iv) as unamended.
- 28 1968 Act, s.16(1)(b)(v) as unamended.

14.9 There is similarly one publicised but unreported English juvenile court judgment. In Anonymous²⁹ Bradford Juvenile Court upheld the council's decision to assume the parental rights of a convicted murderer³⁰ on the ground of his unfitness. The court rejected the father's argument that the council's decision to assume his parental rights was "wholly unethical, immoral, inhuman, vindictive, uncivilized and untenable in law." As with the Scottish cases, the reasoning of the court was not reported but in this case the reasons seem clear even without detailed articulation.

14.10 Sections 1 and 15 merely require the local authority to receive a child into their care in the relevant circumstances. Sections 2 and 16 enable the authority to assume parental rights and duties.³¹ It is probably because the latter sections go much further than the former sections by depriving or at least suspending parents of their otherwise enforceable rights and interests in relation to their children that ultimate judicial control has been built into the procedure.³² But the common element of fundamental significance is that both sets of provisions involve in effect administrative intervention by the state in parent-child relationships through the agency of the local authority. The courts have long had similar powers of intervention, either as the delegate of the Crown acting as parens patriae in England, in exercise

29 [1973] The Times, 19 October. 30 The victim was his wife.

31 The consequences of these decisions are examined in chapter 17.

32 1948 Act, s.2(5); 1968 Act, s.16(8).

of the nobile officium in Scotland or alternatively under statute.³⁴ But the state in its administrative capacity has had in many respects a surprisingly longer history of intervention in these matters.

Section 3 - The historical background.

14.11 Although reception into care under section 1 of the 1948 Act was an innovation of that year, assumption of parental rights as a result of State intervention through the agency of a local authority, parish or other municipal council has had a long history.³⁵ The threshold requirements for the exercise of this power have not changed fundamentally over the years, although the statutory language has probably become less colourful. Early legislation gave to the agency of the State a wide, if not absolute, discretion and it is a feature of the 1948 Act, following upon the Curtis Report,³⁶ that the local authority's powers and duties are set out more carefully. The objectives of care by the local authority are thus more readily comprehensible. Earlier regimes were probably very rigorous and excessively paternalistic.³⁷

14.12 Pinchbeck has traced the relationship between the state and the child in England.³⁸ By the sixteenth century Parliament had established principles similar to those currently applicable. In particular two identified by

33 Part 7. 34 Particularly chapter 15.

35 Generally see Heywood J., Children in Care (London, 1965) and Clarke Hall, The State and the Child (London, 1917).

36 Report of the Care of Children Committee (London, H.M.S.O., 1946), Cmd. 6922.

37 Pinchbeck, "The State and the Child in Sixteenth-Century England - II" (1957) 8 British Journal of Sociology 59 at p.61.

38 Ibid.

Pinchbeck are significant:-

"The children of vagrant and demoralised parents were to be removed from parental control and placed in a new environment to secure their welfare. And finally, the state accepted in principle the responsibility for securing the proper treatment and training of the children thus brought into community care."³⁹

The effectiveness of these principles and the way in which they were implemented were clearly a separate issue and it is unlikely that the standards applied then would meet with approval now. The state, through the direct agency of the Crown in its wardship jurisdiction, could act independently of the legislation. Apparently the interests and welfare of the children were not always foremost in the decision making process of the Crown.⁴⁰ These various ideals soon faded away, but, according at least to Pinchbeck, "the twentieth-century conception of the duty of the state towards the child has its origins, not in the reforming movement of the nineteenth century, but in the paternalistic policy of the Tudor State."⁴¹

14.13 These comments apply to England. They are of little relevance to Scotland which had its own poor law system.⁴² Its origins are to be found in the church rather than in the state, although the legislature intervened as early as 1535 to⁴³

39 Ibid. at p.59. 40 Ibid. at p.70: see chapters 32 and 34.

41 Ibid. at p.72.

42 Smout T.C., A History of the Scottish People 1560-1830 (Fontana, 1972), p.84.

43 James V: 1535 c.29.

establish the principle of parochial responsibility.⁴⁴ The system probably became rather ineffective as time went on, partly because of the close control by the church, partly as a result of local employment customs and partly also because of the Scottish character which would hesitate to go to the parish for charity.⁴⁵ The system broke down in the economic circumstances of the early nineteenth century and in 1845⁴⁷ Parliament established central supervision and other features closer to the English model.⁴⁶

14.14 Poor law legislation involved public interference with parental rights. Even in the nineteenth century the courts were faced with relating the legislation to the underlying common law. For example, in Orr v Kirk-Session of Glassford⁴⁸ the public body had to undertake the responsibility for the charge of a child left destitute; and in Weepers v Heritors and Kirk-Session of Kennoway⁴⁹ the court was required to interpret the legislation against the common law position of the mother of an illegitimate child and the power of the putative father to offer to take charge of the child in answer to a claim for aliment. The relationship between public law codes and private law remedies is not a solely contemporary phenomenon.

14.15 Thus by the twentieth century administrative interference with parental rights was not new. Section 52

44 Smout, op.cit., p.84. 45 Ibid. p.303
 46 Ibid., p.376; Mackie, A History of Scotland (Penguin, 1966) pp. 334 and 335.
 47 Poor Law Amendment (Scotland) Act 1845 (8 & 9 Vict., c.83).
 48 (1831) 9 Shaw 928. 49 (1844) 6 Dunlop 1166.

of the Poor Law Act 1930⁵⁰ was the immediate predecessor of section 2 of the Children Act 1948 and it contains a similar statutory scheme for the assumption of parental rights. The Curtis Committee regarded it as a "very important provision"⁵¹ and in 1945 about sixteen per cent of children in the care of poor law authorities had been the subject of a section 52 resolution.⁵² Later in 1972 the Houghton-Stockdale Committee were also impressed by the power to assume parental rights.⁵³

14.16 A resolution under section 52 of the 1930 Act was subject to judicial confirmation, where necessary, in the same way as under section 2 of the 1948 Act. The normal principle is that a judicial order is necessary before parental rights can be taken away. But there have been two examples when an administrative act was sufficient. The War Orphans Act 1942⁵⁴ placed a duty upon the Minister of Pensions to provide for the care of children for whom pensions or allowances were payable in respect of the death of a parent in the war and who were suffering from neglect or want of proper care. The Guardianship (Refugee Children) Act 1944⁵⁵ enabled the Secretary of State to appoint a guardian of any person in England or Scotland who had arrived there in consequence of war or persecution without a parent. These were rather special functions and did not

50 20 & 21 Geo. 5, c.17. The 1930 Act provision was itself preceded by section 1(1) of the Poor Law Act 1889 and section 1 of the Poor Law Act 1899.

51 Report of the Care of Children Committee, op.cit., para. 19.

52 Ibid., para. 29; Table IV, p.27.

53 Houghton-Stockdale Report, para. 153.

54 5 & 6 Geo. 6, c.8. 55 7 & 8 Geo. 6, c.8.

necessarily involve taking away parental rights. But they are instances of state involvement in the interests of children. There can be no doubt, of course, that state intervention, either judicially or administratively, has increased conceptually and quantitatively since 1948.

Section 4 - The concepts underlying the administrative regime.^{5 6}

(a) Loss or abandonment.

14.17 Paragraph (a) of subsection (1) of section 1 contains three elements: having neither parent nor guardian; abandonment; and being lost. Having neither parent nor guardian or being lost seems to indicate an existing state of affairs without regard to the circumstances giving rise to that condition. It should not be difficult to establish whether that state of affairs exists or not. The only problem may be in construing when a child "is lost".⁵⁷ Normally it means the condition arising when a child is temporarily missing and out of the immediate control of his parent or other custodian. There is no necessary suggestion of parental

56 Any reference hereafter in this chapter to section 1 or 2 is a reference to section 1 or 2 of the Children Act 1948 and includes for the sake of convenience a reference to section 15 or 16 of the 1968 Social Work (Scotland) Act unless there is a specific reference to the contrary. Any references are those sections as amended or substituted by the Children Act 1975.

57 Barker v Westmorland C.C. (1958) 56 L.G.R. 267 is a case either of abandonment or of being lost. There may be elements of both. In any event, although there was no discussion on the point, it was not questioned that the threshold requirements had not been satisfied.

fault or incapacity. There has been no analysis of these provisions nor do the official statistics assist in solving these problems of construction.⁵⁸

14.18 Abandonment, on the other hand, although statistically insignificant, has attracted some consideration.⁵⁹ The expression "abandon" appears in other contexts relating to children⁶⁰ and the general consensus seems to be that it has the same meaning in each context.⁶¹ Bevan, however, suggests rather tentatively that it has a "wider meaning for the purpose of s.1 of the 1948 Act."⁶² This may well be consistent⁶³ with the policy of

58 Each year there is an official report on Children in Care, one for England and one for Scotland. The reports set out the reasons why children came into care during the relevant period and the relative statistics. The figures include all children in care, incorporating those coming into care under other legislation. The reports contain statements of the circumstances supporting the grounds in the 1948 Act but do not give any indication of the problems of interpretation. They do however illustrate the circumstances comprised in certain of the grounds; e.g. death of mother, desertion by mother, confinement of mother, illness of parent, imprisonment of parent, homeless family etc. See Leeding, p.16 and Eekelaar, p.160. For R.S.S.P.C.C. statistics, see [1971] The Scotsman, 15 June.

59 Re M (An Infant) [1961] Ch. 81 is an example of abandonment but there was no discussion of its circumstances.

60 E.g. Children and Young Persons Act 1933, s.1(1); Children and Young Persons (Scotland) Act 1937, s.12(1); Custody of Children Act 1891, ss.1 and 3; Children Act 1975, s.12(2)(d); Adoption Act 1976, s.16(2)(d).

61 Clarke Hall & Morrison, p.882; Bevan, pp.144 and 145; Leeding, p.59. 62 Bevan; p.144.

63 There have been two publicised instances of what may have constituted allegations of abandonment. In Salter [1971] The Times, 17 June the local authority decided that there were not sufficient grounds to receive children into care when their mother went out leaving them with an eleven year old girl; the home was also "undescribably filthy." On the other hand in Watson [1974] The Times, 3 December, two children were taken into care when their father left them at the council offices in protest over conditions in his council house.

of the legislation. The other contexts of the use of the word involve the commission of an offence and the deprivation of parents of their rights.⁶⁴ Section 1 of the 1948 Act involves neither. The precise nature of the function contemplated by that section will be considered later⁶⁵ but it probably involves no more than an acceptance by the local authority of the responsibility for the care and maintenance of the child usually with parental consent but exceptionally without consent. The section is designed to protect the child and at the same time to assist the parent.⁶⁶ There is much to be said, therefore, on policy grounds for a wider rather than a narrower interpretation. In any event there is no manifestly binding reason for giving "abandon" the same meaning as in the other contexts. It may be that the literal meaning of the word is satisfactory for most purposes of section 1 of the 1948 Act. That however is not conclusive; policy may justify a wider interpretation.

64 These are merely generic descriptions and do not reflect the phraseology of the legislation.

65 Chapter 16.

66 Lord Goddard C.J. in In re AB (an Infant) [1954] 2 Q.B. 385 at p.397 described the purpose of section 1(1) as follows:- "Section 1(1) is dealing with children who have no one to look after them, either because their parents are dead or unable to look after them. In other words, its purpose is to provide for care to be taken of a deserted or substantially deserted child, and to prevent it from being an abandoned child."

14.19 Abandonment is also a threshold requirement for the local authority's power to assume parental rights under section 2 of the 1948 Act. The conceptual approach of that section is the same as that of section 1 but the purposes of the provisions are different.⁶⁷ Implementation of section 2 vests in the local authority "the relevant parental rights and powers" in Scotland⁶⁸ and "the parental rights and duties" of the relevant persons in England.⁶⁹ The argument may be put, therefore, that, since deprivation or suspension of parental rights is involved, a wider interpretation in case of doubt may not be justified, even on grounds of policy. This may have been one reason why Parliament has provided some assistance in construing "abandonment" for the purpose of section 2. Where the whereabouts of any parent or guardian of a child received into care have remained unknown for not less than twelve months, the child shall be treated as abandoned.⁷⁰ This does not necessarily assist in construing "abandon" but the indication is rather that a state of affairs is contemplated by the deeming provision rather than deliberate misconduct by the parent or guardian. The implication may be that otherwise "abandon" involves parental misconduct directed towards the child. The official statistics are, of course irrelevant to the construction of an Act of Parliament but it is interesting that "abandoned" is linked with "lost" in the statistics. The official tendency, therefore, as distinct from interpretation, judicial or

67 In Re G (Infants) [1963] 3 All E.R. 370 at p.373 Ungood-Thomas J. remarked that "s.1 deals with what might normally be contemplated as an emergency or a temporary situation, whereas s.2 contemplates an arrangement of a longer and more stable duration."

68 1968 Act, s.16(1) and (3). 69 1948 Act, s.2(1).

70 1948 Act, s.2(9); 1968 Act, s.16(12).

otherwise, is to look at the situation from the child's point of view. In any event it is suggested that there are good reasons to adopt the same attitude in the context of interpretation.

(b) Delegation of parental rights.

14.20 If "abandon" involves leaving a child to his fate^{7 1} rather than describes a state of affairs existing at any moment of time, a parent may delegate his parental obligations without leaving himself open to action under the 1948 Act. This necessitates a further analysis of "abandonment" from an entirely different aspect: from the point of view, not of the parent, guardian or child but of the foster parent caring for the child.

14.21 Normally a foster parent is any person, not being the child's parent, who assumes responsibility for the child.^{7 2} The simplicity of this description is destroyed by the statutory powers of local authorities to care for children and in so doing to board them out with individual persons rather than accommodate them in institutions.^{7 3} The control of foster children provided in Part I. of the Children Act 1958^{7 4} is directed to children living with "private" foster parents; this excludes children in the care of a local authority, in the care of voluntary organisations or in the care of bodies approved officially

71 The test normally applied: see e.g. Clarke Hall & Morrison, pp.882 and 885; paras. 11.24, 11.25, 12.5, 12.6.

72 This is the ordinary meaning which is not necessarily the same as the statutory meaning.

73 1948 Act, s.13; 1968 Act, s.21.

74 6 & 7 Eliz. 2, c.65.

in terms of other legislation^{7.5} The definition of "foster child" in the 1958 Act^{7.6} reflects these policies. The fundamental idea in section 2(1) of the 1958 Act is more precise than the formulation set out at the beginning of this paragraph. The most significant element is a child "whose care and maintenance are undertaken by a person who is not a relative or guardian of his". The earlier legislation had incorporated a further requirement, namely "apart from his parents or having no parents"^{7.7} Although this requirement of physical separation was omitted in the 1958 Act, Sachs J. in Surrey County Council v Battersby^{7.8} impliedly resurrected it for the purpose of the 1958 Act when he said of that Act:

"By its preamble, it was an Act to make provision for the protection of children living away from their parents."^{7.9}

The distinctive current statutory definition of "foster child" therefore is probably of greater technical than substantive importance. The underlying concept is delegation pro tanto of parental functions rather than abandonment of parental powers and duties.

75 Ibid., s.2(2),(3),(4) and (4A).

76 Ibid., s.2(1) as amended by the Children and Young Persons Act 1969, s.52(1) and by the Social Work (Scotland) Act 1968, Sched.1, para.2.1. The current definitions for England and Scotland are not the same but for present purposes the differences are immaterial. The text indicates the provision as amended which applies in England. For Scotland it reads "whose care is undertaken for a period of not more than six days beginning with the day on which the child is received into that care by a person who is not a relative or guardian of his".

77 Section 206(3) of the Public Health Act 1936 (26 Geo. 5 & 1 Edw. 8, c.49).

78 [1965] 1 All E.R. 273.

79 Ibid. at p.276 per Sachs J. emphasis added.

14.22 This matter was given some consideration by Lloyd-Jacobs J. in Wallbridge v Dorset County Council.⁸⁰ The issue was whether the proprietors of a residential school for backward or maladjusted children were subject to the foster children provisions of the Public Health Act 1936 in relation particularly to a small number of children in the school who were in the care of the local authority under the Children Act 1948.⁸¹ The allegation that the Public Health Act applied to the proprietors of the school was, it is suggested, totally misconceived. But the court adopted a less rigorous approach than that. Attention was directed rather to the relationship between the local authority and the children than to that between the school and the children. Lloyd-Jacobs J. in an important passage described the difference between delegation and abandonment in these words:-

"The nature of the separation so expressed is wider than physical absence. Physical absence, if sufficiently prolonged, might well justify an inference of intention to part, and equally occasional meetings might not justify an inference of an intention not to part, but an actual or inferred intention to deny to the child parental guidance and control, or, what amounts to the same thing, inability to provide it, must be associated with physical separation before the apartness upon which the need for this type of protection is based can be created.

80 [1954] 1 Ch.659.

81 Cf. Hill v Minister of Pensions and National Insurance [1955] 2 All E.R. 890 where the issue was whether the mother of children in care under s.1 of the 1948 Act and living in a residential school was entitled to family allowance for them under ss.3(2) and 21(7) of the Family Allowance Act 1945. In holding the mother not so entitled the court commented that the children ceased to live with the mother not because they were at residential school but because they were maintained by the local authority.

Such parental guidance and control must of necessity be in part susceptible of delegation. In this personal capacity the parents cannot always be available to provide it and may often be unable effectively to discharge its obligations. In such cases, the employment or engagement of nurses, tutors, doctors and surgeons, or other skilled persons, although such arrangement may involve the temporary surrender of direct control, cannot fairly be regarded as a denial of parental obligations.

Here again, attention must be had to the extent and duration of such delegation. If in sum it can fairly be regarded as tantamount to complete surrender of authority, or if by reason of its duration it results in the substitution of a mind independent of the parent in respect of material decisions for some indefinite period, it may be that an inference of an intention to part from the child could be drawn. But mere delegation of some part of the parental duty for a limited period cannot of itself provide a sufficient animus which, combined with the fact of absence from home, would constitute the status of living apart."⁸²

No apology is made for this lengthy quotation. The concept of delegation is an important one, particularly in contrast with abandonment; a consideration of it will recur from time to time.

14.23 The legislation with which Lloyd-Jacob J. was concerned was designed to protect children in the "private" foster care situation. Hence the position of the local authority qua statutory caretaker of the child was really irrelevant in Wallbridge v Dorset C.C.,⁸³ although reference was made by the judge to the local authority

82 [1954] 1 Ch. 659 at pp.666 and 667 per Lloyd-Jacob J.

83 [1954] 1 Ch. 659.

as "the alter ego of the parent".⁸⁴ There can be no doubt therefore that in that case the children, including those in the care of the local authority, were not foster children for the purposes of the legislation; they were not "living apart" from their parents. The question of who was exercising parental care and control, the parents or the local authority, was not really in issue.

14.24 The views expressed by Lloyd-Jacob J. introduce two issues of current significance. What is the "status" of a child living apart from his parents, particularly when he is in the care of a local authority?⁸⁵ Secondly, what is the importance of the distinction between abandonment, or more generally, parental culpability and delegation, especially for the purposes of sections 1 and 2 of the 1948 Act? Both questions require an examination of the general scheme of those provisions and at their consequences for the relationship not only between parent and child but also between them and the local authority.⁸⁶

(c) Incapacity and unfitness

14.25 Physical or mental incapacity on the part of the parent or guardian is a threshold requirement for either section 1⁸⁷ or section 2⁸⁸ of the 1948 Act. They are likely to be issue of fact without significant conceptual difficulty. When it comes to parental unfitness, section 2

84 Ibid. at p.670.

85 Chapter 17.

86 Chapter 16.

87 1948 Act, s.1(1)(b); 1968 Act, s.15(1)(b).

88 1948 Act, s.2(1)(b)(ii) and (iii); 1968 Act, s.16(2)(b) and (c).

is much more guarded than section 1. Section 1 talks generally in terms of the parent or guardian being prevented from providing for the child's "proper accommodation, maintenance and upbringing".⁸⁹ A child's proper upbringing is a wide concept, giving the local authority considerable scope and discretion in following the direction in section 1. The question comes close to the issue before the courts in custodial proceedings. Moreover it is a matter exclusively reserved to the local authority. Judicial interference is marginal.⁹⁰ Even so, the question places the parent not the child at the centre: the issue is whether the parent is prevented from providing properly for his child, rather than whether the child is being properly brought up.⁹¹

14.26 The matter for decision in section 2 is also centred on the parent. The alternatives are whether the parent's habits or mode of life or his consistent or persistent parental failures render him unfit to have the care of the child.⁹² The test is clearly parental failings, not the benefit of the child. The interest of the child is at best negatively relevant, as the individual affected by the incompetence of the parent. To what extent the criteria in sections 1 and 2 are conceptually the same. There is, however, one fundamental

89 1948 Act, s.1(1)(b); 1968 Act, s.15(1)(b).

90 Paras. 16.18 to 16.26.

91 l. e. negative not positive from the child's point of view.

92 1948 Act, s.2(1)(b)(iv) and (v); 1968 Act, s.16(2)(d) and (e).

difference. Section 2 is concerned with the intrinsic failings of the parent rendering him parentally unfit. But for section 1 it may be circumstances external to the parental qualities of the parent which prevent him from providing for the child's proper upbringing. So the grounds of intervention under section 1 are potentially wider than those in section 2.

14.27 The power to assume parental rights is available only in relation to a child in the care of the local authority under section 1.⁹³ The overriding requirement in section 1 is that intervention is necessary "in the interests of the welfare of the child".⁹⁴ There is no similar requirement in section 2 in relation to the decision of the local authority to assume parental rights, presumably because the child may remain in the care of the local authority only if it continues to be in his interests to do so.⁹⁵ But the interests of the child are a requirement if the matter comes before the sheriff or the juvenile court in England under the review procedures in the Act.⁹⁶ Ultimately therefore either under section 1 or section 2 a child cannot be received into care nor his parent's rights assumed by the local authority unless it is in the interests of the child to do so, even if one of the other requirements has been satisfied. The scheme of the legislation thus

93 1948 Act, s.2(1); 1968 Act, s.16(1)(a).

94 1948 Act, s.1(1)(c); 1968 Act, s.15(1)(c).

95 Para. 16.3.

96 1948 Act, s.2(5)(c); 1968 Act, s.16(8)(a).

comprehends at the threshold stage the interests both of the parent and of the child in distinct but related fashion. Intervention in the interests of the child is not sufficient.

CHAPTER 15OFFICIAL CARE THRESHOLD REQUIREMENTS: THE JUDICIAL REGIMESection 1 - Introduction

15.1 There is no reason why the State should not select which of its various institutions is most appropriate in the individual context to protect the interests of children. Nor is there any reason why new institutions should not be set up for the purpose: for example, children's hearings in Scotland. Chapter 14 dealt with the administrative regime of intervention. This chapter deals with the judicial regime. It is purely a division of convenience. Indeed it is probably inaccurate to some extent to deal with children's hearings as part of the judicial regime. One of the features of the Scottish system is the clear division between adjudicative and discretionary functions, simply because they are conferred on different bodies. The same division of function holds good in England although in practice, as one body exercises both functions, they tend to merge into each other.

15.2 The pattern of judicial intervention is much the same as the pattern of administrative intervention: the satisfaction of threshold requirements prior to the exercise of a substantive discretion. This is true of the earlier legislation as it is of current legislation.

The origins of judicial intervention may be found in the mid-Victorian Industrial Schools Act 1866¹ and the Reformatory Schools Act 1866². These provisions were subsequently consolidated in the Children Act 1908³ and thereafter amended and consolidated by the Children and Young Persons Act 1933⁴ and the Children and Young Persons (Scotland) Act 1937⁵. The most recent enactments are the Children and Young Persons Acts 1963 and 1969, the Social Work (Scotland) Act 1968 and the Children Act 1975⁶. The legislation has thus been under almost constant review and presumably reflects current values and attitudes. The amendments from time to time of the threshold requirements indicate the Parliamentary response to changing ideas. What is striking is that the fundamental concepts have changed little. The main reforms have been the introduction of more sophisticated and sensitive institutions and procedures.

15.3 It is difficult to generalise with any degree of accuracy on this point but the overall tendency seems to be towards less precise prescription of the indicia of parental abuse or deficiency and an increasing confidence that a discretionary system will bring about the best or at least

1 29 & 30 Vict., c.118. This was preceded by the Industrial Schools Act 1861 (24 & 25 Vict., c.113) and the Industrial Schools (Scotland) Act 1861 (24 & 25 Vict., c.132).

2 29 & 30 Vict., c.117. This was preceded by the Youthful Offenders Act 1854 (17 & 18 Vict., c.86).

3 8 Edw. 7, c.67.

4 23 & 24 Geo. 5, c.12.

5 1 Edw. 8 & 1 Geo. 6, c.37.

6 Respectively 1963 c.37, 1969 c. 54, 1968 c.49 and 1975 c.12.

a justifiable decision as regards the child. For example, the 1866 Act⁷ talked quite specifically of being found begging, receiving alms, being found wandering and not having any home, being found destitute and frequenting the company of reputed thieves. The 1908 Act⁸ introduced, for example, unfitness to have the care of the child. There was greater generalisation and increasing sophistication in the 1933 Act which referred to falling into bad associations and exposure to moral danger⁹. The most up-to-date terminology is avoidable prevention of proper development and need of care and control.¹⁰ The Scottish provisions disclose a similar trend, where there has been separate Scottish legislation. These expressions may indicate a preference for a more scientific and professional approach to child care and parental assessment but they may create problems of interpretation: in other words interpretational discretion.¹¹

Section 2 - Civil and criminal criteria in the early Legislation

15.4 The earlier legislation attempted to treat differently those children who were technically guilty of an offence¹² and those who were merely the victims of parental inadequacy¹³. Later enactments have as a matter of deliberate policy¹⁴ tended to assimilate these two categories.¹⁵ This may be a

7 Industrial Schools Act 1866, s.14.

8 Children Act 1908, s.58(1)(d).

9 Children and Young Persons Act 1933, s.61(1)(a).

10 Children and Young Persons Act 1969, s.1(2)(a).

11 See generally the Kilbrandon Report, pp.22 and 23; Ingleby Report, pp.21 to 23.

12 Reformatory Schools Act 1866, s.14.

13 Industrial Schools Act 1866, s.14.

14 E.g. Kilbrandon Report, p.12.

15 Social Work (Scotland) Act 1968, s.32(2); Children and Young Persons Act 1969, s.1(2).

reflection of the view that juvenile crime is partly the outcome of parental inadequacies; such deficiencies, of course, may well be brought about by environmental disadvantages. Whatever the justification, offenders and non-offenders alike are now liable to undergo similar "treatment".

15.5 This contemporary view seems to have commended itself several decades ago to some Scottish judges. Why this happened is not disclosed from the reports. It is unlikely to have been deliberate. Sentencing juvenile offenders seems always to have been a matter of some concern to judges and the High Court of Justiciary has usually required a positive statutory warrant before imposing specific penalties upon children. The availability of reformatory and industrial schools would seem to have affected judicial views. There is, consistently with this, evidence of an intention to consult the interests of the child.

15.6 There is generally no threshold requirement to be satisfied before a juvenile offender is sentenced, apart, of course, from the commission of an offence. In McQuire v Fairbairn^{1 6} a boy of fifteen, who had pleaded guilty to a charge of breach of the peace, was sentenced to imprisonment for ten days and thereafter under section 14 of the Reformatory Schools Act 1866 to be sent to a reformatory school for five years. The reformatory school detention

16 (1881) 9 Rettie (J.) 4.

sentence, though clearly competent, was quashed by the High Court of Justiciary largely because it was inappropriate:-

"... I am of opinion that this part of the sentence [reformatory school detention] was not warranted by the conviction and cannot be sustained. The statute on which it proceeded was never intended to give the magistrate power to send children, under 15 years of age, or beyond it, to a reformatory school for such offences as this. Quite another and much more serious class of offence is suggested by the words of the statute."¹⁷

Although the Act was widely drafted, the restriction imposed by the court upon itself operated not as a threshold requirement but as part of the exercise of the judicial discretion.¹⁸

15.7 A construction consistent with this view was applied to section 15 of the Industrial Schools Act 1866 by Lord McLaren in Hunter v Waddell.¹⁹ That section provided that where a child apparently under twelve was charged with an offence punishable with imprisonment or a less punishment but had not been convicted of theft, if the magistrate decided that the child ought to be dealt with under the Act, he could order him to be sent to a certified industrial school. The first statutory requirements antecedent to the exercise of the power²⁰ were more

17 Ibid. at p.5 per Lord Young.

18 See also Farquharson v Guthrie (1884) 5 Couper 454, Taylor v Tarras (1901) 3 Adam 298, Rorrison v. McDonald (1894), mentioned in Dewar, The Children Act 1908 and other Acts affecting children in the United Kingdom (Edinburgh, 1910) pp.36 and 37.

19 (1905) 7 Fraser (J.) 61.

20 Age and the penalty for the offence.

formal than substantive; they were not fundamentally threshold requirements relating to welfare. The desirability of dealing with a juvenile under the Act raised issues of greater substance. Lord McLaren however described the conditions under which children could be sent to industrial schools in these words:-

"There is the provision applicable to children who may be found begging or wandering about without any fixed occupation or place of abode, there is the provision applicable to destitute children, and there is this provision applicable to children who have not been well brought up, and who have fallen into the commission of petty crimes." ²¹

15.8 This sentence is a judicial paraphrase of the statutory provisions and there is some doubt about the provisions referred to by Lord McLaren. The first two circumstances identified by the judge seem to reflect some of the provisions in section 14 of the 1866 Act. The references to "children ... not ... well brought up" and the "commission of petty crimes" in his third illustration are warranted by neither section 14 nor section 15 of the Act. He may, however, have been putting a policy gloss upon the provisions of section 15, which may arguably be sufficiently wide to justify this type of approach. The decision in that case probably did not turn on this precise point, although the court seemed to regard the sentence of detention in an industrial school as both

21 (1905) 7 Fraser (J.) 61 at p.63.

competent and appropriate. Lord McLaren could see no reason why "this was not a suitable case for sending the boy to a certified industrial school".²² He failed to give any justification, either legal or substantive, for his views. The whole matter was treated very much as an issue for the exercise of the court's statutory discretion.

15.9 The case of Hunter v Wadell²³ is clearly unsatisfactory. Although this point was not noted by Lord McLaren in his judgement, it seems that the young offender had pleaded guilty to a charge of theft.²⁴ The prosecutor then withdrew the charge and the magistrate purported to send him to an industrial school under section 15 of the 1866 Act. That section applies inter alia where a child is "charged" with a certain offence. It is questionable if the section applies where the "charge" is withdrawn. On the other hand the part of Lord McLaren's judgment already quoted refers to children not well brought up and who have committed petty crimes. This reflects the philosophy but not the terminology of section 14 of the 1866 Act. But this provision was not apparently founded upon. In fact the requirements of that section do not appear to have been fulfilled, for there was no evidence of inadequate parental upbringing. On close scrutiny therefore the competency of the sentence may be questionable.

22 Ibid. at p.64.

23 Ibid.

24 Ibid. at p.62.

This point escaped the attention of the High Court and it is a matter of some importance. For, although the High Court directed its detailed attention to another point, the order pronounced by the magistrate remained effective and must therefore be presumed to have been regarded by the members of the court as both competent and appropriate.

15.10 That issue apart, that decision indicates the perhaps questionable practice of slipping conveniently from criminal to non-criminal criteria for admission to industrial schools or, in modern terms, for deciding whether care proceedings are warranted or whether the child is in need of care and protection. This judicial uncertainty in treating these proceedings as civil or criminal is reflected in two other cases. In Dunn v Mustard²⁵ the order of the sheriff-substitute removing a child from the custody of his father under section 6 of the Prevention of Cruelty to Children Act 1894²⁶ following upon his conviction for cruelty was fundamentally null because it referred, presumably by mistake, to the incorrect statute. On the petition for suspension before the High Court of Justiciary, there was judicial comment on the nature of the proceedings, particularly whether the order was reviewable in that Court or in the Court of Session. The Lord Justice-Clerk commented:-

"It seems to me that an order of this kind [depriving a parent found guilty of cruelty towards his child of custody of that child] is a proceeding taken in direct connection with what is essentially

25 (1899) 1 Fraser (J.) 81.

26 57 & 58 Vict., c.41.

a criminal proceeding, viz., a prosecution for cruelty to children ... The whole information on which the order rests is derived from criminal proceedings."²⁷

According to Lord Adam:-

"The proceedings in this case commenced with an application for the removal of a child from the custody of its parent. Prima facie that appears to be a civil and not a criminal matter, but when we look further into it the matter bears a criminal complexion ... And if that is the nature of the proceeding, it makes no difference that the order committing for trial and the order for custody are separate." ²⁸

15.11 The issue in that case was not the nature of the threshold requirements for admission to an industrial school but those needed to deprive a parent of custody. There is however a fundamental contextual similarity between the two problems. To classify as criminal the proceedings taken to remove a parent from the custody of his child as a result of alleged or proved cruelty is not to equate such proceedings with an order to send a juvenile offender to an industrial or reformatory school; such proceedings are more analagous to those founded upon civil criteria for admission to an industrial school. The common element is some form of parental inadequacy. The unfortunate aspect of Dunn v Mustard²⁹ was treating as criminal proceedings designed solely to deprive a parent of custody. It is suggested that the allegation or proof

27 (1899) 1 Fraser (J.) 81 at p.83 per Sir J.H.A. Macdonald.

28 Ibid. at p.84 per Lord Adam.

29 Ibid.

of an offence against the child as the threshold requirement for the exercise of the power of deprivation does not colour the proceedings as "criminal".

15.12 A clear-cut instance of manipulating the civil and criminal grounds for admission to an industrial school is White v Jeans.³⁰ A boy of thirteen pleaded guilty to a charge of theft and sentence was deferred for three days. The order then pronounced by the magistrates stated that the boy "apparently under the age of 14 years ... has been found wandering and having a parent who does not exercise proper guardianship over him"³¹ and directed him to be sent to a certified industrial school. That statement clearly reflects the wording of the second limb of section 58(1)(b) of the Children Act 1908, the statute relevant to the proceedings. The threshold requirements specified in section 58(1) are entirely civil in character and it would seem to be incompetent to exercise the power in section 58(1) in response to a plea of guilty to a charge of theft. Subsections (2) and (3) of section 58 certainly enable an offender in certain circumstances to be sent to an industrial school but they do not, on the face of the report at least, seem to apply. Section 57(1) would probably have enabled the magistrate to send the offender to a reformatory school but there was no suggestion of the exercise of that power.

30 1911 S.C. (J.) 88.

31 Ibid. at p.90.

15.13 The justification of the magistrate's order put forward on behalf of the prosecutor was that new proceedings were initiated on the second day. There does not seem to be any evidence supporting the statement that the child was "found wandering and having a parent who [did] not exercise proper guardianship". Such evidence would constitute the basis for an industrial school order. It was nevertheless suggested for the prosecutor that the boy's father had asked for the boy to be sent to an industrial school and that in any event the order was in the boy's best interests. These comments may well have been true but clearly they could not justify an order under section 58(1)(b).

15.14 On the basis of this analysis there is considerable doubt about the validity of the order sending the child to an industrial school. The High Court of Justiciary refused to suspend the order, thus confirming their view of its competency, although they had commented very critically upon the irregularities of the first interlocutor pronounced by the magistrate. The Lord Justice-Clerk, having commented upon these irregularities, stated as regards the second order:-

"... in the boy's case the facts supply no good reason for altering the order pronounced in the proceedings taken with a view to sending him to an industrial school. There were new proceedings instituted on 22nd September in order to avoid the necessity of convicting him of a crime, and these are not affected by any defects there may have been in the prior proceedings, which were abandoned. I see nothing irregular as regards these new proceedings."³²

32 Ibid. at p.93 per Sir J.H.A. Macdonald L.J.-C.

15.15 Nothing more was said on this point. The High Court apparently failed on the face of the report to consider the fundamental competency of the industrial school order. It may have been done with the very best intentions, as in the case of the magistrate's decision, but that does not justify a potentially incompetent order. But even if the industrial school order had been competent - probably not a difficult task for the prosecutor in the circumstances - White v Jeans³³ demonstrates a tendency to blur the earlier distinctions between the civil and criminal threshold requirements for making industrial and reformatory school orders. It must be emphasised that the Industrial and Reformatory Schools Acts represented the introduction of radical concepts into the very delicate area of parental rights in mid-Victorian society. It is perhaps not surprising that the judiciary failed to some extent to comprehend the fundamental nature of the legislation and thus allowed itself to be misled on some matters.

Section 3 - The requirements in general

(a) Introduction

15.16 On the face of the earlier statutory provisions the power to send a youthful offender to an industrial or reformatory school should have caused little difficulty, for the requirements were minimal and straightforward, while the important decision whether to make an order was

33 Ibid.

discretionary.³⁴ On the other hand it is understandable why to remove a child from his parents for reasons of parental inadequacy should have raised several problems of interpretation and application. The threshold requirements were couched in language which, even in the earlier legislation, could give rise to a variety of interpretations.³⁵ The trend in the legislation is towards increasing generality;³⁶ this will cause more interpretational difficulties. For example, avoidable prevention of a child's proper development,³⁷ especially when coupled with the need of care or control, is a concept of greater inherent flexibility and generality than a child found begging or receiving alms. Admittedly the earlier legislation had enacted as a ground the circumstance of a child found wandering and not having proper guardianship. The latter requirement contains an element of interpretational discretion. This does not distort the overall movement towards greater generality. These provisions have been only infrequently scrutinised by the courts. The reason may be that the issue is rarely

34 The statutes did not confer an absolute discretion: the test was "expediency": e.g. Children Act 1908, s.58(1). It was not until the enactment of Children and Young Persons Act 1933, s.44 and the Children and Young Persons (Scotland) Act 1937, s.49 that Parliament provided some sort of policy to guide the courts.

35 Indeed it may be that the vagueness of the requirements is deliberate drafting policy.

36 The Kilbrandon Report, p.58 recommended that in the Scottish context only one reason should justify referral to a children's hearing, namely "that prima facie the child is in need of special measures of education and training". Something like the present series of grounds would then exemplify such circumstances.

37 Children and Young Persons Act 1969, s.1(2)(a).

contested, so that the juvenile court operates more often administratively than judicially.³⁸ The older authorities tend to be Scottish and the more recent reported cases are English. To examine the Scottish cases first thus presents an almost exact chronological sequence.

(b) The background to the Scottish approach

15.17 The judicial tendency in Scotland to move from criminal to civilly based requirements has already been noted.³⁹ The intention, no doubt commendable, may have been to avoid any future stigma of criminality. But the characterisation of proceedings to deprive a parent of custody, even where the ground was the offence of cruelty, as criminal⁴⁰ rather conflicts with that intention. That may, however, have been a minor judicial aberration for in Wilson v Stirling⁴¹ Lord Moncrieff clearly characterised the object of the legislation as preventive:-

"There can be no question as to the importance and beneficial character of the Industrial Schools Act of 1866. It was intended to provide for cases in which the provisions of the existing law were found to be inadequate. Its

38 Technically it has both an adjudicative and an administrative function, depending upon which part of the proceedings is relevant. In Scotland this distinction of function has been deliberate: the sheriff adjudicates, the children's hearing acts administratively.

39 Paras. 15.10 to 15.15.

40 Dunn v Mustard (1899) 1 Fraser (J.) 81.

41 (1874) 1 Rettie (J.) 8.

object was to step in and rescue from a downward course a class of children but too common amongst us who, though not yet answerable to the criminal law of the country, are in a fair way to become so. It gives power to remove them from their vicious surroundings, and to provide them with lodging, food, and education during a certain period of youth. I should be sorry to say anything that might throw difficulty in the way of working such an Act.

I concur with counsel for the respondent in holding that the classes of children who fall under the 14th section of the Act are not dealt with as in themselves criminals. The object of that clause, and I may say of the statute generally, is not to punish but to prevent. But it is clear that all four divisions of that section apply to children having no proper home or domestic superintendence."⁴²

This analysis suggests that the statutory function contained in section 14 of the Industrial Schools Act 1866 and in its statutory successors is fundamentally administrative rather than judicial, particularly having regard to the discretionary power given to the court. The nature of the power is however governed to some extent by the requirements for its exercise, to the extent that they disclose its purpose. The administrative nature of the legislation is supported by the existence of an additional and clearly administrative remedy under section 43 of the Act. The availability of such a remedy did not, of course, oust the jurisdiction of the court to suspend the magistrate's order.

42 Ibid. at pp. 9 and 10 per Lord Moncrieff L.J.-C.

15.18 Each of the statutory provisions in question contains two elements: the threshold requirement and the discretion. Some of the earlier statutes also contained a more general requirement which gave the court something in the nature of a second discretion, exercisable before the principal power. They required the court to be satisfied that it was "expedient" for the child to be dealt with under the Act in question. This was dropped from the 1933 and 1937 Acts but it re-appeared later in a different and more specific form. Under the 1963 Act the new requirement was failure to receive "such care, protection and guidance as a good parent may reasonably be expected to give";⁴³ and under the 1969 Act "need of care or control which he is unlikely to receive unless the court makes an order under this section in respect of him".⁴⁴ This later requirement was probably designed as a nexus between the circumstances giving rise to the need of care and the parent's responsibility for those circumstances. Otherwise, it could be argued, a parent could be deprived of his child for reasons for which the parent was not responsible. The earlier reference to "expediency" exemplified a looser nexus; the later references a more positive one. They acknowledge in an oblique fashion a stronger parental rights approach to deprivation circumstances rather than a child-orientated approach.

⁴³ Children and Young Persons Act 1963, s.2.

⁴⁴ Children and Young Persons Act 1969, s.1(2).

15.19 Many of the difficulties involved in administering this type of legislation arise from problems of communication, investigation and information-gathering. Perhaps the official intermediary under the Social Work (Scotland) Act 1968, namely the reporter, will solve some of these problems. It has however been one of the features of the earlier examples of this legislation that the issue may be brought before the relevant court by "any person".⁴⁵ The 1933 Act restricted the category of informant to a "local authority, constable or authorised person".⁴⁶ The 1963 Act made no change in this regard and the position has been preserved in the 1969 Act.⁴⁷ On the other hand, under section 37(1) of the Social Work (Scotland) Act 1968, any person who has reasonable cause to believe that a child may be in need of compulsory measures of care may pass to the reporter the available information.

15.20 Statistics on informants do not seem to be available but a glance at the earlier Scottish cases suggests that the public at large was not inspired to exercise their rights in relation to children whom they considered might have required the protection afforded by the legislation. An inspector of the Royal Scottish Society for the Prevention of Cruelty to Children, the apparently only person "authorised" for the purposes of the more recent legislation, has promoted proceedings on a number of occasions.⁴⁸ The police are

45 Industrial Schools Act 1866, s.14; Children Act 1908, s.58(1).

46 Children and Young Persons Act 1933, s.62(1).

47 Children and Young Persons Act 1969, s.1(1).

48 E.g. Dunn v Mustard (1899) 1 Fraser (J.) 81; G. v. Minister of Pensions 1950 S.L.T. (Sh. Ct.) 79; Gillespie, Petitioner 1964 S.L.T. (Sh. Ct.) 67.

occasionally involved.⁴⁹ Relatives seem to have little interest in removing children from their parents but more in securing the child's release from the care of the local authority. It is probably too soon to ascertain whether the current Scottish machinery, centred upon the reporter, is an incentive to the public at large to commit themselves to child protection.⁵⁰

(c) The legislation in detail: England and Scotland

15.21 It has already been suggested that the legislation demonstrates a trend towards greater generality in the substance of the threshold requirements. Despite the greater specificity of the earlier legislation, attempts have been made judicially to produce a generic description of some or all of the threshold requirements.⁵¹ The common element of these requirements in the Industrial Schools Act 1866 appeared to Lord Moncrieff to be "children having no proper home or domestic superintendence".⁵² This comment may be helpful even today. It postulates a value judgment upon the adequacy of the home and of the parents. The early legislation assisted the judges by providing greater specificity in the requirements. The current rules⁵³ require a similar kind of value judgment; they are however more difficult to interpret and apply.

49 Wilson v Stirling (1874) 1 Rettie (J.) 8; Goodbrand, Petitioner 1915, 1 S.L.T. 446.

50 See also Clive E.M., "Getting children out of dangerous homes" 1976 S.L.T. (News) 201.

51 Rather like the recommendation of the Kilbrandon Report, p.58; para.15.16, n.36.

52 Wilson v Stirling (1874) 1 Rettie (J.) 8 at p.10 per Lord Moncrieff L.J.-C.

53 For general comments, see Bevan, pp.23 to 26; Watson and Austin, pp. 33 to 36; Holden, p.107.

Paragraph (a) of section 1(2) of the Children and Young Persons Act 1969, for example, sets out criteria which are to some extent quite challenging. The ground of ill-treatment⁵⁴ may be difficult to describe but to recognise it in practice should be less difficult. It is the largely physical consequence of certain instances of parental inadequacy. Avoidable impairment or neglect of the child's health, probably mental as well as physical,⁵⁵ may also be readily identifiable in practice; the effect on mental health may be however more difficult to establish.

15.22 These grounds relate to the consequences of past conduct. As such they are not too difficult to apply. Avoidable prevention of the child's proper development is a more challenging concept. It is probably necessary at the outset in any individual case to establish what is the particular child's proper development. That involves an examination of what norms are appropriate for the individual child. Then the question is whether such development is being prevented or neglected; and if so, whether it is avoidable. Compared with ill-treatment, impairment or neglect of health, which may be established largely if not wholly by reference to past events, proof of this requirement involves an element of prognosis founded upon a valid diagnosis. Paragraphs (b) and (bb) of subsection (2)⁵⁶ latch on to the probability of these requirements being met and thus enlarge the already

54 Holden, p.107, seems to equate ill-treatment in this context with ill-treatment as an offence under the Children and Young Persons Act 1933, s.1.

55 See Bevan, p.23; Holden, p.107. This was recommended by the Ingleby Report, p.149, if that was not already the position in relation to the 1933 Act.

56 1969 Act, s.1. Paragraph (bb) was added in 1975: Children Act 1975, s.108 and Sched.3, para.67.

significant problems of establishing the ground. One of the features of these paragraphs is the reference to the "household" of which the child and a convicted person are members. This is explicit recognition that the legislation is not restricted to children of their nuclear family and is available to protect children from step-parents, as in the Maria Colwell case. On the other hand, paragraphs (c) to (f) of the same subsection relate to an existing state of affairs and are not per se a projection into the future. But they too may involve considerable problems of interpretation and application, although the range of difficulty does not include prognosis.

15.23 All the criteria set out in subsection (2) attract an additional requirement;⁵⁷ namely, proof that the child is in need of care or control which he is unlikely to receive in the absence of an order made in these proceedings. This introduces in all cases, therefore, both a diagnostic and a prognostic element.⁵⁸ Firstly, is the child in need of care or control?⁵⁹ There is no statutory need for any link to be established between the circumstances in paragraphs (a) to (f) and the need of care or control.

57 According to Watson and Austin, p.33 "an over-riding condition".

58 This is the wider approach claimed by the legislation's sponsors: see Watson and Austin, p.35.

59 An integral part of this question is what is care or control. S.70 of the 1969 Act provides inclusive definitions of "care" and "control". S.32(3) of the 1968 Act provides an inclusive definition of "care". The two are by no means identical. Generally see Stevenson O., "Care or control : a view of intermediate treatment" (1971) 2 Social Work Today No.4, p.3 where "control" is stated to view the problem from society's point of view and "care" from the child's point of view.

The need may therefore be by reason of some other circumstances, although in practice this is probably unlikely in view of the comprehensive nature of paragraphs (a) to (f). Secondly, if care or control is needed, are the parents or other guardians unlikely to provide it? This effectively introduces a causal nexus between the need for care, founded upon the statutory indicia, and parental or similar inadequacy or deficiency. This clearly involves an element of speculation.⁶⁰

15.24 The pattern in section 32(2) of the Social Work (Scotland) Act 1968 is different. There is, for example, no overall need of care or control from some source other than the parent.⁶¹ Until the introduction of the Children Act 1975 paragraphs (b) and (c) of section 32(2) of the 1968 Act set out a statutory connection between lack of parental care and the indicia of need. This requirement has now been dropped from paragraph (b)⁶² which means that in Scotland a child who is inter alia exposed to moral danger may be in need of compulsory measures of care. In England on the other hand, exposure to moral danger is not enough. The child must also be in need of care or control which he is unlikely to receive unless an order in care proceedings is made in respect of him.⁶³ Thus

60 According to Clarke Hall & Morrison, p.132, the test is now clearly objective and not dependent upon what would be reasonable for the individual parents in question.

61 I. e. no "care or control" requirement.

62 Children Act 1975, s.108 and Sched. 3, para. 54(a).

63 Children and Young Persons Act 1969, s.1(2)(c).

in Scotland the question of need arises at the dispositional stage of the process;⁶⁴ in England at the threshold stage. Paragraph (c) of section 32(2) however has retained the statutory link between the lack of parental care and the likelihood of causing the child unnecessary suffering or seriously impairing his health or development. Similarly in England avoidable prevention or neglect of the child's proper development is not enough; the "care or control" requirement must also be satisfied.⁶⁵ All the other Scottish criteria stand alone. In practice the difference between the two systems most likely to be important relates to the "offence" requirement. In Scotland the commission of an offence is enough to qualify for compulsory measures of care.⁶⁶ In England a finding of guilty together with satisfaction of the "care and control" requirement is necessary.⁶⁷ The distinction, clearly drawn, is a matter of policy; but each system must be looked at in its own context, particularly, so far as Scotland is concerned, with respect to the powers of the reporter. The Scottish Act thus pays less attention overall to the interests of the parent than the English legislation. But the difference is marginal. The law of Scotland appears to presume some element of parental failing for the purposes of all the paragraphs of section 32(2) of the 1968 Act except paragraph (c),

64 Para 18.27.

65 1969 Act, s.1(2)(a).

66 1968 Act, s.32(2)(g).

67 1969 Act, s.1(2)(f).

without giving the parent any chance to deny his inadequacy. In England it is always a matter of proof. To that extent England places more weight upon the integrity of parental rights and interests and Scotland is more welfare-orientated.

(d) The approach to the threshold requirements: Scotland

15.25 Scottish judicial authorities on this legislation are sparse and, such as they are, they regrettably throw little light upon the legislation. It will be recalled that in Wilson v Stirling⁶⁸ Lord^{Moncrieff} described the threshold requirements in section 14 of the Industrial Schools Act 1866 as applying to children "having no proper home or domestic superintendence"⁶⁹ That rather archaic description is useful even today for it points to some recognisable standards of parental adequacy. In that case the ground of the petition to send the boy to an industrial school was that he had been found begging or receiving alms. The child had apparently called at a house, where he and his mother were well-known, and begged "a piece". As the decision of the High Court of Justiciary turned on a point of procedure, it was not necessary to consider whether these facts amounted to "begging" under the Act. Lord Young, alone among his colleagues to comment, indicated that this was "not clear".⁷⁰ It does seem rather narrow to

68 (1874) 1 Rettie (J.) 8.

69 Ibid. at p.10.

70 Ibid. at p.13.

to classify as "begging" one request for bread at a private household. Given the context of the Act, something much more significant was probably contemplated by the legislature. But even if the conduct of the boy amounted to "begging", it was open to the court to decline to make an industrial school order if it was not expedient to deal with the boy in that way. That might have been the easier way of solving that problem.

15.26 In Goodbrand - Petitioner^{7 1} the decision turned on the statutory procedure prior to the stage of deciding whether the requirements for making an industrial school order had been satisfied. The substantive allegation was that the children were residing in a brothel with their mother. On the face of it, this fact would seem to have been covered by section 58(1)(g) of the Children Act 1908. There are not enough facts available to decide whether the proviso to paragraph (f), namely proof of proper guardianship and due care, was satisfied. Sheriff-substitute Lyell made some remarks highly critical of the Act, particularly in its application to Scotland, although they were not directed to the substantive sections:-

"I cannot say that I am surprised that some difficulty is occasioned to public officers and others in their endeavours to enforce the provisions of the Children Act 1908 in this country." ^{7 2}

71 1915, 1 S.L.T. 446.

72 Ibid. at p.446 per Sheriff-substitute Lyell.

Thus in this case also an opportunity to consider the substantive provisions of the legislation was lost.

15.27 The same conclusion is true for most of the other Scottish cases. For example, in Dunn v Mustard^{7 3} and Gillespie, Petitioner^{7 4} the ground was parental cruelty, the offence under section 12 of the Children and Young Persons (Scotland) Act 1937 and subsumed under section 65(1)(b)(i) of that Act within the definition of "in need of care or protection". In Franks v. Glasgow Corporation,^{7 5} G v Minister of Pensions^{7 6} and G v Glasgow Corporation^{7 7} the ground was neglect. Thus in all these cases the parental conduct was so extreme as to constitute a criminal offence. In no case, perhaps not surprisingly, was the issue analysed.

15.28 Penningham Parish Council v McAdam^{7 8} was an odd case. A mother and her illegitimate child had become chargeable to the Parish poor fund. The council was liable under section 38 of the Industrial Schools Act 1866 to make certain repayments to the Treasury and attempted to recover these from the child's putative father. When the child was four and in receipt of a generous payment of aliment from the putative father, she was committed to a certified industrial home for eleven years; the ground

73 (1899) 1 Fraser (J.) 81.

74 1964 S.L.T. (Sh. Ct.) 67.

75 (1942) 59 Sh. Ct. Rep. 139.

76 1950 S.L.T. (Sh. Ct.) 79.

77 (1954) 70 Sh. Ct. Rep. 358.

78 (1896) 13 Sh. Ct. Rep. 126.

was that she had been "found destitute and not under proper guardianship". In the first place, that ground does not accurately reflect the phraseology of the statute; nor does it seem relevant in the circumstances reported. Is a child in receipt of aliment destitute? In any event, Sheriff-substitute Lyell decided that the putative father could not be held responsible for the circumstance that the child was found destitute and not under proper guardianship. The council's claim was therefore rejected.

15.29 Most of the issues discussed in these cases were procedural. One point however has been recently established. It in a sense is also procedural but it has more fundamental implications. To mention it is not entirely out of place here. The first appeal to the Court of Session under the Social Work (Scotland) Act 1968 concerned a decision of Sheriff Bell whether the grounds of referral had been established.⁷⁹ The stated ground was "lack of parental care is likely to cause unnecessary suffering or serious impairment of health or development".⁸⁰ The sheriff's decision on this ground was rejected by the mother; it was held by the court on appeal that the decision whether the ground had been established should be reached on the most up-to-date information that could be laid before the court.⁸¹ According to Lord Grant L.J.-C.,

79 Kennedy v B 1973 S.L.T. 38.

80 Supported by allegations of overcrowded and inadequate accommodation and of the verminous condition of the child and his clothing.

81 On the assumption, presumably, that the child's future was at stake, not merely past events.

it would be unfortunate if the sheriff had to hold as established grounds of referral which were based on a situation which, at the date of the hearing, had fundamentally altered or ceased to exist. The submission of current information on the threshold requirements is thus important.⁸² It reinforces the "welfare" approach to compulsory admission into care.

15.30 Although some of the grounds constituting need of compulsory measures of care⁸³ reflect earlier legislation, both civil and criminal,⁸⁴ there is no reason to presume that they will be similarly interpreted. There is no necessary correlation.⁸⁵ In Neep,⁸⁶ for example, there was the possibility that the grounds for compulsory measures of care might be established even where charges of ill-treatment of the children had been found not proven in earlier criminal proceedings.

15.31 It would have been simpler if medical operations and blood transfusions without the consent of parents had been treated uniformly under the legislation.⁸⁷ Failure

82 See generally Grant J.P., "Bridging Gaps" 1973 S.L.T. (News) 190.

83 E.g. neglect, ill-treatment.

84 Especially the Children and Young Persons Act 1933, s.1 and the Children and Young Persons (Scotland) Act 1937, s.12.

85 But in practice since the operation of the 1969 Act it has been normal to assume that a verdict of guilty in the criminal courts would sustain a finding of ill-treatment for the purposes of s.1(2)(b) of the 1969 Act: Blake L.W., "Battered Babies and the powers of the juvenile court - section 1(2)(b), Children and Young Persons Act 1969" (1973) 137 J.P. 242.

86 [1972] The Scotsman, 20 April.

87 I.e. as an offence under the Children and Young Persons Acts, as a threshold requirement for care proceedings or the need of compulsory measures of care.

to consent to an operation may, it will be recalled, amount to neglect contrary to section 1 of the Children and Young Persons Act 1933.⁸⁸ The current issue, however, is whether failure to consent to an operation⁸⁹ or to a blood transfusion⁹⁰ justifies compulsory measures of care. The matter is not uncomplicated, having regard to public health legislation and particularly to the legal protection afforded to the religious predispositions of parents vis-a-vis their children?⁹¹ Fundamentally there is a conflict of policy which the courts are forced to resolve by what amounts to a political decision in determining which principle is given priority.

15.32 There is little doubt that the courts in several states in the U.S.A. may competently order blood transfusions for children contrary to their parents' wishes.⁹² Each case depends, of course, upon its own circumstances and

88 Para.11.18; Oakey v Jackson [1914] 1 K.B. 216.

89 Recently in the American case of Houle [1974] The Times, 19 February, a court in Maine ordered doctors to operate on a deformed baby against the wishes of the parents. The baby subsequently died [1974] The Times, 26 February. For comment see [1974] The Times, 20 February.

90 Which is presumably a type of operation.

91 Paras. 44.16 to 44.21.

92 See generally Kitchen and Paulsen, Juvenile Courts: Cases and Materials (Brooklyn, 1967), p.222 to 229 and (1966) 64 Michigan L.R. 554 at pp.555 and 556 where it is stated: "In compliance with the state's duty as parens patriae to protect the welfare of minors, the courts have consistently authorised the administration of blood transfusions to children whose parents have refused, on the basis of their religious beliefs as Jehovah's Witnesses, to consent to such treatment. The courts' parens patriae jurisdiction over minors emanates from the statutory powers of juvenile courts to provide for the protection and control of minors, and allows the courts, under appropriate circumstances, to substitute their authority for that of a child's parents."

the courts seem prepared to rely either upon their neglect jurisdiction⁹³ or their powers under the parens patriae doctrine.⁹⁴

15.33 The competency of using the Children and Young Persons Acts in England for the purpose of forcing a child to have a blood transfusion against the parents' wishes has never been judicially determined. If parental failure to allow a child to undergo a medically desirable operation can constitute a breach of section 1 of the 1933 Act,⁹⁵ it would be difficult to argue that a similar failure would not satisfy section 1(2)(a) of the 1969 Act that the child's health was being avoidably neglected.⁹⁶ The success of the care proceedings would thus depend upon proof of the second requirement, namely need of care or control which he is otherwise unlikely to receive. The parent will have stated⁹⁷ his intention not to provide this element of care. The issue will become whether the transfusion is an element of care needed by the child. Medical evidence, it is suggested, would effectively determine that issue.

93 I.e. their statutory powers of intervention similar to those in the Children and Young Persons Act 1969 in England and the Social Work (Scotland) Act 1968.

94 Which seems to be more widely available in U.S.A. jurisdictions than in England.

95 Oakey v Jackson [1914] 1 K.B. 216; Clarke Hall & Morrison, p.17, and Bevan pp.189 and 192.

96 There are differences between the statutes but the underlying common element is "neglect". The 1969 Act does not require "wilful".

97 As a matter of hypothesis in these circumstances.

15.34 Official advice in England, however, indicates that the Children and Young Persons Acts should not be used for this purpose.^{9 8} Their use attracts "a number of legal and practical difficulties".^{9 9} The official circular seems to be more concerned with protecting the doctor against the parents rather than with the child's interests. In most cases the clinical judgment of two or more medical consultants will reduce or eliminate the risk of civil proceedings by parents but this may not always be so. The official view is, of course, entirely understandable on a practical plane; and it must be conceded that there was no suggestion that care proceedings would be incompetent. It remains regrettable nonetheless that the child's interests were given little or no weight.

15.35 In Scotland, on the other hand, the courts on at least two occasions have intervened in this matter. In an anonymous case¹ before Perth Children's Hearing it was decided that a baby whose parents refused a blood transfusion² was in need of compulsory measures of care. Sheriff Kermack had earlier opened the way for this decision by determining that the parents' refusal "constituted a lack of parental care which could cause the child unnecessary suffering or impair his health and development".³ It would seem difficult, in the light of

98 Ministry of Health Circular No. F/P9/1B dated 14 April 1967 and Home Office Circular No. 63/1968 dated 5 March 1968, both reproduced in Clarke Hall & Morrison, pp. 693 and 694. They do not relate to Scotland.

99 Ibid.

1 [1973] The Scotsman, 27 April.

2 Because of their religious beliefs as Jehovah's Witnesses.

3 [1973] The Scotsman, 27 April. The report does not reflect the precise terminology of the Act but its implied reference to the Act is clear.

the phraseology of section 32(2)(c) of the Social Work (Scotland) Act 1968, to question the sheriff's interpretation, particularly when it is recalled that section 32(3) of the Act includes "treatment" as part of "care". There would seem little doubt that a blood transfusion can constitute "treatment".

15.36 Different proceedings seem to have been used in McManus⁴ where Sheriff Henderson granted a petition allowing staff at Stirling Royal Infirmary to give a baby a blood transfusion after his parents had refused permission.⁵ These could not have been proceedings under the Social Work (Scotland) Act 1968 for at least two reasons. Firstly, such proceedings do not proceed by petition. Secondly, it would not be for the sheriff to determine the merits of care under the Act. It must therefore have been a petition to the sheriff in the exercise of his custodial jurisdiction. There is probably no reason in principle why the sheriff or indeed the Court of Session should not deal with one aspect only of the child's relationship with his parents⁶ and in this sense these proceedings would be similar to the prerogative wardship jurisdiction of the High Court in England. It is difficult to comment further, given the brief report in the newspaper, and it is unfortunate that the Sheriff's innovative judgment was not fully reported.

4 [1973] The Scotsman, 13 September.

5 Again because of their religious beliefs as Jehovah's Witnesses.

6 Para. 45.55 and 45.56.

15.37 The Scottish attitude contrasts with the much narrower views adopted, officially at least, in England and it is much more consistent with the experience in the U.S.A. Just as some American judges have relied upon both traditional and statutory powers, so the Scottish sheriffs have taken a wide view of their old and new functions which is entirely consistent with proper attention being paid to the child's interest in the matter. This does not mean that the parents' position is ignored. But in the context of blood transfusions at least, the parents' religious and other predispositions are given less weight than the needs of the child, once the threshold requirements, without which there is no jurisdiction, have been satisfied.

(e) The approach to the threshold requirements: England

15.38 Although some of the more recent English cases contribute more to an understanding of the civil threshold requirements than the Scottish cases, it is nevertheless significant that very few disputes have found their way into the law reports. Earlier English cases determined which institution was liable to receive the child or young person⁷; or the appropriate punctum temporis for determining residence for a similar purpose.⁸ Some discussion has taken place on the status of the local authority exercising statutory powers of care. But relatively few have dealt

7 Stoke-on-Trent Borough Council v Cheshire C.C. [1915] 3 K.B. 699.

8 South Shields Corporation v Liverpool Corporation [1943] 1 All E.R. 338.

with the substance of the threshold requirements. This is surprising in view of the large number of children in care. Perhaps the allegations are admitted as matters of fact; perhaps legal advice or representation is unavailable for various reasons or not sought; perhaps the parents are not concerned; perhaps the interest of the child is simply ignored. The reasons are admittedly not known. On the other hand the generality or lack of specificity in the provisions may in the normal case make an appeal too speculative.

15.39 The history of the legislative provisions has already been considered. They represent an attempt to achieve a balance between the interests of the parents and of the children. The legislation thus contains an inherent regard for the interests if not the rights of parents⁹; despite the policy of protection of the child. They do so indirectly rather than directly, for the statutory provisions in both jurisdictions are framed passively rather than actively; that is, by way of the effect on the child rather than in terms of parental or other responsibility. The courts, it will be seen, tend to reflect this view of the legislation.

15.40 The Children and Young Persons Act 1969 does not specifically attribute the responsibility for the existing state of affairs to a parent or guardian; the

⁹ There is however only one reference to "parent" or "parental" in s.1(1) of the 1969 Act and two in s.32 of the 1968 Act.

"need of care or control" test is, no doubt deliberately, left open. The 1963 Act applied the test of a "good parent". The 1933 Act directly referred to the unfitness of the parent or guardian of the child in question. The same is true of Scotland; the 1968 Act refers generally to "lack of parental care", thus distinguishing that requirement from the lack or inadequacy of the care of the particular parent or guardian in question. Thus in both jurisdictions the test is objective. The consequence is that anyone responsible for a child is amenable to these statutory provisions. In In re B (a minor)¹⁰, for example, the ill-treatment meted out to the child¹¹ seems to have been the foundation for the child's placement in care of the local authority. This distinction is not without significance. The question "does this child need care?" is different from "is this parent providing inadequate care". The approach of one question, it is suggested, is quite the reverse of the approach of the other. The current legislation thus indicates an attitude more sympathetic to the child but it nevertheless requires an assessment of the care handed out to the child at the time of investigation.

15.41 While applying the 1963 Act definition in In re An Infant (Care or Protection)¹² Lord Parker C.J. drew attention to the duality of the requirements to be proved.

10 (1974) 124 N.L.J. 620, [1974] The Times, 22 June.

11 Probably by the child's stepfather, for he was convicted of causing actual bodily harm.

12 (1965) 63 L.G.R. 338.

In that case they were firstly falling into bad associations or being exposed to moral danger and thereafter the non-receipt of such care, protection and guidance as a good parent might reasonably be expected to give. Such a view was implicit in the view expressed by Lord Goddard C.J. in Bowers v Smith¹³ where the exposure of the young persons to moral danger was their attempted sexual intercourse with a seventeen year old girl in a makeshift structure at the end of a football field. He argued:-

"It is a very serious thing to say ... that because young adolescents commit some sexual misbehaviour ... it is due to neglect on the part of the parents."¹⁴

It is thus not justifiable, in principle at least, to assume parental inadequacy where a child or young person is otherwise within the definition of "in need of care or protection". The issues of child conduct and parental responsibility are separate although, as it will be seen later, they are linked. For the purposes of section 1 of the 1969 Act and section 32 of the 1968 Act there would appear to be no need to prove a causal nexus between the delinquent behaviour and the inadequacy of parental care.

Section 4 - The individual grounds

(a) Exposure to moral danger

15.42 To turn now to consider the substance of some of the requirements in turn: the ground most closely considered

¹³ [1953] 1 All E.R. 320.

¹⁴ Ibid. at p.323.

by the courts is "exposure to moral danger". Some attention has also been devoted to the analogous provision "falling into bad associations". Both appear in the Scottish Act of 1968; only the former is included in the English legislation of 1969. The pattern of the legislation has, of course, changed over the years, but "exposure to moral danger" has remained a relevant ground, although the 1933 Act included others to exemplify the meaning of "exposure to moral danger". That has always been one of the least precise grounds in the legislation.

15.43 There seems little doubt that, whatever circumstances are contemplated by "exposure to moral danger", they need not amount to conduct which is criminal. The circumstances of the cases considered by the English courts suggest that the moral danger to which the children may be exposed is normally sexual in origin. It nevertheless seems clear that contact with drugs, drug pedlars or criminals could amount to exposure to moral danger.¹⁵ The word "moral" is flexible enough to include widely differing circumstances and to vary with changing mores. Indeed the adoption of the appropriate moral context was one of the difficulties in Mohamed v Knott.¹⁶

15 E.g. Holden, p.107.

16 [1969] 1 Q.B. 1.

15.44 The earliest of three principal cases, Bowers v Smith,¹⁷ involved section 61(1) of the 1933 Act.

Three boys under the age of seventeen had been sent to play football in a field. There they had or attempted to have sexual intercourse with a seventeen year old girl in a makeshift structure at the edge of the field. The justices considered that the requirements of the Act had been satisfied and placed the boys under the supervision of a probation officer. The Divisional Court set aside these orders not because the boys had not been exposed to moral danger but because the events in themselves did not suggest any lack of proper parental care. The decision thus turned upon the second of the two requirements. There was nothing to indicate that actual or attempted sexual intercourse did not amount to exposure to moral danger!¹⁸

15.45 The allegation in In re An Infant (Care or Protection)⁹ was that a girl of eleven was either falling into bad association or was exposed to moral danger. She had apparently been sexually assaulted at the age of eight by her cousin's husband; he had also been sentenced to thirty months' imprisonment in respect of unlawful sexual intercourse with her when she was eleven; she had been indecently assaulted by her brother on at least two

17 [1953] 1 All E.R. 320.

18 The unreality of this ground is clear if the question is asked - was the girl in the case not also exposed to moral danger? Indeed it could be argued that merely being in existence involves exposure to moral danger. To be in danger, it is suggested, is quite different. The difficulty is brought about perhaps by the statutory passivity of the child or young person allegedly in need of care or control or protection. The child or young person may or may not bring exposure to moral danger upon himself. The possibilities seem almost endless.

19 (1965) 63 L.G.R. 338.

occasions and also by a cousin?⁰ As in Bowers v Smith²¹ there was no suggestion that these circumstances did not amount to "falling into bad associations" or "exposure to moral danger"; the decision again turned upon parental responsibility.

15.46 The problem in Mohamed v Knott²² was different. The wife, a partner to a Nigerian Moslem marriage, was just over thirteen years of age. The husband had earlier engaged in Nigeria in a sexual career which could be described as promiscuous. After they had arrived in England, the husband was treated for venereal disease contracted as a result of intercourse with a prostitute in Nigeria. After he was cured, he asked for his wife to be fitted with a contraceptive device. These circumstances were drawn to the attention of the authorities by their medical adviser. The justices, applying the definition in the 1963 Act and founding upon "exposure to moral danger", made a fit person order in favour of the London Borough of Southwark. In coming to this conclusion they applied inter alia the standards of "any decent minded English man or woman".²³

20 She was probably not only exposed to but also actually in moral danger.

21 [1953] 1 All E.R. 320.

22 [1969] 1 Q.B. 1.

23 Ibid. at p.15 per Lord Parker C.J. quoting the justices. There was no indication how such a standard was to be ascertained.

15.47 The Divisional Court on appeal revoked the fit person order. The potentially polygamous marriage of the parties was recognised and the status of wife thus afforded to the girl. Her marriage did not disqualify her from the protection afforded to any "child or young person".²⁴ Most importantly it was decided that the nature and quality of the relationship of the parties was to be judged not merely by English standards but by reference to the background of the parties themselves.²⁵ On that basis there was nothing "inevitably repugnant" about the girl's way of life; marriage at an early age was natural and for a girl of thirteen to marry a man of twenty five was not abhorrent. Lord Parker C.J. summed up his views:-

"Granted that the appellant [husband] may be said to be a bad lot, that he has done things in the past that nobody would approve of, it does not follow from that that the wife, happily married to the appellant, is under any moral danger by associating and living with him. For my part, as it seems to me, it could only be said that she was in moral danger if one was considering somebody brought up in and living in our way of life, and to hold that she is in moral danger in the circumstances of this case can only be arrived at, as it seems to me, by ignoring the way of life in which she was brought up, and the appellant was brought up."²⁶

24 Ibid. at p. 14 per Lord Parker C.J. The applicability of this legislation to a wife who is also a child or young person and whose husband is the source of moral danger, as here, suggests that these proceedings could in effect bring about a judicial separation, a purpose for which they were probably not intended. On the general question whether care and protection are relevant for infant husbands or wives, see "Care and Protection: Infant Husband or Wife" (1940) 104 J.P. & L.G.R. 35 and "Care or Protection: Infant Wife or Husband" (1944) 108 J.P. & L.G.R. 14.

25 Ibid. at p. 15.

26 Ibid. at pp. 15 and 16.

This emphasises the flexibility of the test of moral danger. The way appears to be open to look not at the standards of society at large but at the standards relevant to the parties in question. Such standards are not entirely self-imposed. Account must be taken of the standards of the parties; but there is no obligation for them to be decisive. This represents a considerable modification. Mohamed v Knott²⁷ however may be exceptional. It may represent an attempt by an English court to avoid imposing purely English moral standards upon persons for whom such standards were clearly not appropriate.

15.48 The earlier cases turned, it has been seen, upon factors other than exposure to moral danger.²⁸ In each of these cases the standards of parents were available as a basis for the assessment of parental care and responsibility. In Mohamed v Knott²⁹ on the other hand the girl's parents found no place in the arguments of the court. Their absence from England was sufficient, apparently, to disqualify them. It is thus not surprising that the matter of parental care, so vital in the other cases, did not arise. The idea of a wife being exposed to moral danger by associating with her husband, however relevant in a matrimonial context, seems strange in the

27 Ibid.

28 Rather upon the quality of parental care and parental responsibility for the events in question.

29 [1969] 1 Q.B. 1.

context of children and young persons. The case may therefore be regarded as special in the light of its own circumstances. If the judicial dicta are extrapolated to an English context, the decision is entirely consistent pro tanto with earlier authority. For a young girl to associate with a person of proved sexual promiscuity is exposure to moral danger.

(b) The "sibling" effect

15.49 One of the grounds which has caused a certain amount of difficulty of interpretation is section 1(2)(b) of the 1969 Act; not, strangely, from the substantive point of view but simply from an ambiguity of meaning. The substance of the ground is the probability that the child's proper development will be avoidably prevented or neglected or his health will be avoidably impaired or neglected or he will be ill-treated, "having regard to the fact that the court or another court was found that that condition is or was satisfied in the case of another child or young person who is or was a member of the household to which he belongs". The intention is clear: to enable a court to take action before the child's welfare is prejudiced by parents already found inadequate with regard to a child of the same household.³⁰

³⁰ See e.g. Surrey County Council v S [1973] 3 All E.R. 1074 at p.1076 per Lord Denning M.R. and at p.1078 per Lawton L.J. See also Kepple [1974] The Times, 17 April; The Scotsman, 18 April, where the newly born son of Mrs Pauline Kepple (Maria Colwell's mother) was the subject of a place of safety order and potentially a care order on the ground of the mother's neglect of her other children.

15.50 In Surrey County Council v S³¹ an elder daughter was allegedly ill-treated by her parents. The girl subsequently died; her father was charged with but acquitted of her murder. After the death of the elder daughter the county council attempted to bring the younger daughter into their care and control in terms of proceedings under section 1(2)(b) of the 1969 Act; the ground being the probability of the younger daughter being ill-treated, having regard to what had allegedly happened to the elder daughter. It was generally admitted that no court at any time had found the requirements of section 1(2)(a) of the 1969 Act satisfied in relation to the elder daughter. The justices largely for that reason³² decided that they were not competent to make a finding in relation to the younger daughter in the proceedings before them.

15.51 This conclusion seems prima facie reasonable³³ but both the Divisional Court³⁴ and the Court of Appeal³⁵ thought differently. Paragraph (b) refers to "the fact that the court or another court has found" that the requirement in paragraph (a) "is or was satisfied" in

31 [1973] 1 All E.R. 1027 (Q.B.D.): [1973] 3 All E.R. 1074, [1974] Q.B. 124 (C.A.).

32 See [1973] 1 All E.R. 1027 at p.1029.

33 It was conceded more or less all round that this represented the strict and grammatical meaning of the provision. This view is also shared by Blake L.W., "Battered babies and the powers of the juvenile court - section 1(2)(b), Children and Young Persons Act 1969" (1973) 137 J.P. 242.

34 Eveleigh and May JJ.; Lord Widgery C.J. dissenting.

35 Lord Denning M.R., Buckley and Lawton L.JJ.

the case of another child of the same household. A cursory reading suggests that the required judicial finding will have already taken place. A closer analysis indicates that this is probably not so. The fourth line of paragraph (b) states "is or was"; this appears to comprehend a finding in relation to the other child by the court determining the requirements in relation to the principal child, here the younger daughter. The Court of Appeal decided that when section 1(2)(b) referred to "the court", it meant the court by which the application was being heard and that "has found" meant not found by a previous court but simply found as a fact.³⁶ It follows therefore that the court before which the case was being heard could receive evidence about earlier incidents in relation to another child and find that that child was or had been ill-treated or neglected. In that event the court could consider, having regard to that fact, whether the child in question was covered by section 1(2)(b) of the 1969 Act. This view is eminently sensible.³⁷ It does not, of course, exclude and clearly comprehends the possibility of another court having come to a conclusion about the "other" child. This interpretation gives the courts greater scope for intervention in the parent-child relationship than an interpretation founded upon the earlier view, rejected by the Court of Appeal. The authoritative interpretation gives the court greater power to deal with the whole issue without necessarily relying upon the decision of a prior court. It is an interpretation which may favour the welfare of the child rather than the parents' position.

36 [1974] Q.B. 124 at p.135 per Lord Denning M.R., supported strongly by Buckley and Lawton L.JJ.

37 In the sense that it gives effect to the policy of the legislation as conceived by the court. It has, of course, been criticised as being grammatically unsupportable by Blake, op. cit.

Section 5 - The statutory balance between parent and child

15.52 That ground of intervention is relevant only in England; the Scottish Act of 1968 contains no counterpart. Both jurisdictions, however, contain, as already noticed, a double requirement in relation to exposure to moral danger, impairment of health or development, unnecessary suffering or ill-treatment. The statutory phraseology in the two Acts is different; but the additional requirement of lack of parental care or need of care or control is clearly relevant. It has already been tentatively suggested³⁸ that this additional requirement to some extent swings the balance of the legislation against the child in favour of the parent. This aspect must now be considered in more detail.

15.53 The mere fact of exposure to moral danger or the existence of one of the other grounds forming the first part of the double requirement does not in itself indicate inadequate parental care or the need of care or control from some other source. The whole circumstances must be viewed not just from the child's point of view but also from the parents' point of view. For example, Bowers v Smith³⁹ indicates that the commission of the indecent act, giving rise to the exposure to moral danger

38 Para. 15.24.

39 [1953] 1 All E.R. 320.

of which the parent had no knowledge, was not sufficient to infer that the parent had failed to give his child sexual instruction. Lord Goddard C.J. commented on the "most reprehensible character" of the boys' conduct "which was deserving of some condign punishment".⁴⁰

But he added:-

"But it is quite another thing to say that, because these boys committed a grossly dirty act of this sort, they did it because their parents had not exercised proper care and control over them. All that the parents had done in this case was to send the boys to play football."⁴¹

15.54 The Chief Justice was concerned with the definition of "in need of care or protection" in section 61 of the 1933 Act. An inadequate parent is clearly a statutory requirement. But the nature of the requirement calls for a value judgment on the part of the court. It is not a simple issue of fact.⁴² The critical circumstance in Bowers v Smith⁴³ is probably that the event in question was apparently the first example of such conduct on the part of the boys. In a sense a value judgment of this type is a judgment inferred from the established facts. But in that case the court was obviously disinclined to read too much into the facts about the parents' adequacy.

40 Ibid. at p.322.

41 Idem.

42 As already mentioned, there is an element of both diagnosis and prognosis: para.15.22.

43 [1953] 1 All E.R. 320.

15.55 Lord Goddard C.J., on the other hand, suggested obiter that "if boys are found repeatedly committing criminal or disgraceful acts, the court may be justified in drawing the inference that parental discipline is wanting".⁴⁴ His opinion clearly reflected a bias in favour of parental adequacy, rebuttable perhaps by evidence of repeated delinquency; "even if it happens on two or three occasions with the same girl, the parents knowing nothing about it, ... it is due to neglect on the part of the parents".⁴⁵ Such a view predicates an almost wholly subjective test of parental adequacy which hinges upon parental knowledge. It is tentatively suggested that a subjective test is fundamentally inappropriate. It is difficult to validate or challenge claims to knowledge. There are problems of evidence. More particularly, a subjective standard is heavily biased in favour of parents, perhaps potentially or actually inadequate parents, to such an extent that the purpose of the legislation in protecting children from their own inadequate parents is in danger of being thwarted.

15.56 Certain hypothetical circumstances allegedly covered by the statutory definition were suggested by Lord Goddard C.J.:-

44 Ibid. at p.323.

45 Idem.

"If a girl or boy is found being kept in a house when the mother is permitting prostitutes to assemble or to be housed, or if the mother herself is a prostitute or is carrying on a loose life, it is very proper that the children should be removed ..."⁴⁶

It follows that a child in those circumstances would be exposed to moral danger and at the same time the parent would be either unfit to exercise care or not exercising proper care. That would involve contemplating the same circumstances from the point of view of both child and parent, but independently so. There would have to be direct evidence to satisfy each of the two requirements. It could on the other hand be argued that the prostitution of a mother is not necessarily evidence of inadequate care; she may be a very capable, affectionate and generous parent. But it is unlikely that Lord Goddard C.J. would have shared such a view. Parental adequacy is in any case a fairly flexible idea and differing opinions are not uncommon in this context. So in this sense also parental adequacy is a value judgment based upon specific substantiated facts. This point apart, however, it is possible to understand Lord Goddard C.J.'s approach, without necessarily agreeing with its application, in attempting to describe circumstances which could satisfy both requirements. Even these hypothetical instances show that the application by Lord Goddard C.J. of the approach he postulated is biased in favour of the parents' view.

⁴⁶ Ibid. at p.323.

15.57 This criticism cannot so easily be levelled against Lord Parker C.J. in In re An Infant (Care or Protection).⁴⁷ In that case there was very little doubt that the young girl was exposed to moral danger or falling into bad association. The justices dismissed the application because, no evidence having been received from the girl's parents, a prima facie case had not been established. The Divisional Court took the view that it could not be suggested that there was no case to answer; on the contrary, the facts suggested ex facie a lack of care, protection or guidance. According to the Chief Justice the question of the adequacy of parental care could not be determined until the justices had heard what the parents of the child had to say. The matter was referred back to them.

15.58 In the course of his opinion Lord Parker C.J. identified four issues in particular on which information would be needed:-

- (a) whether the events had occurred without the parents' knowledge;
- (b) whether they had occurred despite every care taken by the parents;
- (c) whether the facts "spoke for themselves";
- (d) whether what had happened could not have happened if proper care had been given.

47 (1965) 63 L.G.R. 338.

On the basis of these issues, Lord Parker C.J.'s approach had progressed considerably beyond that of Lord Goddard C.J. Clearly parental knowledge was not the only test, nor even a sufficient test. Lord Parker C.J.'s approach seemed to be designed to answer specifically the question whether the child "is not receiving such care, protection and guidance as a good parent may reasonably be expected to give". That, of course, is the question posed by section 2(1)(a) of the 1963 Act enacted in place of section 61(1)(a) of the 1933 Act. It is suggested that the test envisaged by the 1963 Act is not subjective but objective.⁴⁸ The court must presumably decide upon the standard of care, protection and guidance which a good parent may reasonably be expected to satisfy. Admittedly that would be difficult to formulate and a court might decline to do so while at the same time proceeding to decide whether the care, protection and guidance given by the parent in question fell below that standard. Courts often adjudicate upon flexible standards without defining them. To do so, however, the court would need to investigate what care, protection and guidance was given to the child in question. The ultimate situation contemplated by Lord Parker C.J. was a set of circumstances so blatant that lack of the necessary care could be inferred without any evidence, or perhaps even in the face of the

⁴⁸ Bevan, p.25; Watson and Austin, pp.35 to 36.

evidence, from the parents. This approach seems entirely in accord with the statutory function. It also rids itself of the subjective test postulated or inferred by Lord Goddard C.J. and, most importantly, it looks at the circumstances from the child's point of view rather than from that of the parents. The parents' conduct and attitudes cannot, of course, be ignored; they are balanced, if need be, against the circumstances in which the child has found himself; they do not form the centrepiece of the exercise.

15.59 An incidental but not insignificant question is whether the parents can be compelled to account for their parental care. If not, Lord Parker C.J.'s approach would be undermined. The alternative would be to make an inference prejudicial to the parents if they did not co-operate. But in this area of the law judges on the whole prefer actual information rather than to proceed by inference or assumption. Section 34(1) of the 1933 Act places an obligation upon the parent or guardian to attend at the court when required to do so.⁴⁹ There does not appear to be any requirement in terms obliging the parent to answer questions put to him. It may be difficult to infer such a duty, for by so doing a parent may be giving evidence of a crime or offence which he has

⁴⁹ S.41(2) of the Social Work (Scotland) Act 1968 makes similar provision for a children's hearing.

committed against his child. But the practical answer may be that, once a parent is in court, he would probably co-operate by providing any information the court wishes.⁵⁰ This, however, raises fundamental issues about how the court is to obtain the information it needs to carry out its function under this type of legislation.

15.60 These procedural aspects apart, the existence of the double requirement and the way in which the courts have dealt with these issues indicate that, at the threshold stage of the proceedings, neither the welfare of the child nor the position of the parents dominates. Parliament has created a rather complex relationship between these two aspects and in a sense the court is faced with an ad hoc decision to be made in the circumstances of each case. That was probably intended. If the additional requirement relating to the need of care and control had been omitted, the courts would have been concerned to examine only the consequences of the parent-child relationship, thereby disregarding parental responsibility for such consequences and the adequacy of parental care. Clearly Parliament as a matter of policy regarded that as undesirable.

50 Bevan p.71.

CHAPTER 16

THE STATUS OF CHILDREN RECEIVED INTO CARE

Section 1 - Introduction

16.1 Chapter 14 analysed inter alia the threshold requirements to be satisfied under section 1 of the Children Act 1948¹ and section 15 of the Social Work (Scotland) Act 1968² before the duty cast upon the local authority to receive children into their care became enforceable.³ The system of receiving children into care can be fully understood only when the relationship between the local authority, the parents and the child after actual receipt into care is taken into account. The welfare of the child is an integral part of that relationship. It is the purpose of this chapter to examine the relationship so arising and the part played by the welfare doctrine. The synthesis so created by adding to the threshold requirements the consequences of their satisfaction presents a view of the provisions as a whole and in particular the status of children received into care.

1 11 & 12 Geo.6, c.43.

2 1968 c.49.

3 In this chapter any reference to s.1 is a reference to s.1 of the Children Act 1948 and includes a reference to s.15 of the Social Work (Scotland) Act 1968 unless otherwise indicated.

Section 2 - Abandonment and delegation

16.2 The importance of the distinction between parental abandonment of the child and parental delegation of his functions is vital to the scheme of section 1.⁴

This argument should now be taken further. One of the grounds for the exercise by the local authority of their functions under section 1 is parental abandonment.⁵ That section, which has so far been considered analytically but not dynamically,⁶ contains certain provisions which seem prima facie at least to contain possible inconsistencies.⁷ This probably arises because of the introduction of some more elastic concepts into the section.

16.3 There are five crucial elements in section 1:-

(a) The statutory duty of the local authority is to "receive" the child into their care.⁸ It has been often emphasised that the authority cannot "take" a child into their care.⁹ In practice most children come into care at the request of one or both parents.¹⁰

4 Para. 14.24.

5 The exact phraseology of s.1(1)(a), which is significant, is that the child "has been and remains abandoned" by his parents: c.f. s.2(1)(b) which applies where "a parent or guardian has abandoned" the child.

6 Paras. 14.4 and 14.5

7 Clive E.M., "Refusing to return children to dangerous homes" 1976 S.L.T. (News) 265.

8 S.1(1).

9 E.g. Clarke Hall & Morrison, p.882; Eekelaar, p.159; Leeding, p.58; Levin, "The Control of Local Authority Powers over Children" (1971) 4 Family Law 101. Cf. Cavanagh, p.135 where reference is made to the "duty to assume the care" of certain juveniles. This is not what the Act says and, it is suggested, is misleading.

10 Leeding, p.59; Eekelaar, p.159. It is important that it is voluntary; coercion would invalidate the parental decision: see Anonymous [1970] The Scotsman, 11 July per Sheriff-substitute Byrne.

(b) Once a child is in care, the local authority's duty is "to keep the child in their care so long as the welfare of the child appears to them to require it".¹¹ This is entirely consistent with subsection (1)(c) which provides that a child cannot in effect be received into care unless that course is "necessary in the interests of the welfare of the child".

(c) Subsection (3) disables the authority from keeping a child in their care "if any parent or guardian desires to take over the care of the child". This would appear to confer a right on the parent or guardian to have the child returned at his request. Does it confer on the parent the privilege of changing his mind or does the local authority retain some power of control?

(d) Subsection (3) concludes by placing a duty on the local authority to endeavour to secure that the care of the child is taken over by a parent, guardian, relative or friend when to do so is "consistent with the welfare of the child". It is interesting that subsection (3) of the Scottish enactment is, probably for practical reasons, preceded by a duty placed on the local authority to take all reasonable steps to discover the whereabouts of the child's parent or guardian. This gives the ensuing obligation a greater chance of fulfilment.

(e) Subsection (3A), inserted in 1975,¹² effectively restricts the right of a parent or guardian to remove

11 S.1(2).

12 Children Act 1975 (1975 c.72), ss.56(1), 73.

the child from the care of the local authority either without the consent of the local authority or without giving not less than twenty eight days' notice of his intention to do so. This provision supports the view that the local authority retains a certain power of control over the child while he is in care under section 1. The parent does not therefore appear to have an unrestricted privilege of changing his mind.

16.4 There are three points of general concern in relation to section 1. The functions conferred upon the local authority are exercisable by them only where "it appears to them" that the relevant requirement has been fulfilled. A considerable substantive discretion, both on the merits and as a matter of interpretation, has thus been conferred upon the administrative body;¹³ there is little scope for judicial intervention.¹⁴ The potentially conflicting duties of the local authority and the apparently¹⁵ overriding place given to parental wishes would indicate that the section must be construed as a whole of which each provision must be treated as an integral part and not an independent enactment. Finally the concept of the welfare of the child, whether specific or general, plays a number of differing roles. It is

13 In Re M (an infant) [1961] 1 All E.R. 788 at p.793 Lord Evershed M.R. argued that this statutory formula "must be taken to confer an absolute discretion on the person or authority concerned provided it is exercised bona fide".

14 Para. 16.29.

15 Paras. 16.5 to 16.7.

thus not surprising that the courts have paid considerable attention to their view of the "scheme" of the provisions.

16.5 The broad philosophy of section 1 would appear to suggest a considerable if not paramount regard for parental wishes. Is section 1, then, merely a device for enabling parents to delegate their duty of care to the local authority in certain prescribed circumstances? If so, then all the grounds in subsection (1) are intelligible except "abandonment" in the sense of parental culpability. It would be odd for a parent to rely upon his own reprehensible action as a reason for asking the local authority to receive his child into care.¹⁶ The answer probably is that persons other than parents may ask (in the unofficial sense) for a child to be received into care. If so, reliance upon parental culpability, even to some extent, seems reasonable.

16.6 Such a view may find support in the argument that the provisions apparently giving effect to parental wishes apply only after a child has been received into care; they can technically at least have no bearing upon the threshold requirements enabling a child to be received into care. The final argument is that "abandoned" in paragraph (a) probably does not mean the same as in the other statutory contexts. The phrase is "has been and remains abandoned". This may indicate a state of abandonment

16 The judicial power to make an order under s.1(3) of the Children and Young Persons Act 1969 (1969 c.54) when the child is "beyond the control of his parent or guardian" under s.1(2)(d) of that Act is, it is suggested, quite different: similarly s.32 (2)(a) of the Social Work (Scotland) Act 1968.

rather than the act giving rise to that state. If these various arguments are correct, section 1 is probably no more than a power given to parents or guardians to delegate the care of the child to the local authority. It is not a duty of positive intervention conferred upon an administrative body. It is a duty to receive into care, as the Act says, when certain facts have been established, but largely on the initiative of the parent or some other person. This conclusion would be consistent with the underlying doctrine that only a court can ultimately deprive or suspend a person of parental rights. Have the courts conceived the scheme of the section in this way?

Section 3 - The judicial view of the scheme of section 1

(a) The earlier cases

16.7 The cases, mostly English, which use the scheme of the legislation to support the conclusions of the various courts tend to be rather complicated and the issues with which this chapter is concerned are not normally given a prominent place in the judicial argument. The problems usually arise out of a tripartite relationship; that is, natural parents, foster parents appointed by the local authority¹⁷ and the local authority

17 1948 Act, s.13(1)(a); 1968 Act, s.21(1)(a). Cf. the position of foster parents "appointed" by the natural parents.

itself.¹⁸ Complexities also occur, in England at least, as a result of the competition for jurisdiction between the local authority acting administratively under the Act and the High Court exercising its prerogative jurisdiction¹⁹ as parens patriae.

16.8 The English authorities demonstrate changing attitudes to the scheme of the legislation over the years. The possibility of inconsistency or at least administrative conflict between subsections (1) and (3) of section 1 of the 1948 Act has already been formally acknowledged.²⁰ Subsection (1) appears to require the local authority to receive a child into care if the threshold requirements have been satisfied, including the welfare test. Subsection (3), on the other hand, may confer a right upon parents to have their child returned to them. Even if that were the correct interpretation of these provisions, the local authority could give effect to subsection (3) and then immediately be invited to invoke subsection (1) again. But that could be a course potentially

18 Others may be involved less frequently: e.g. guardians or step-parents. See Levin J. "Step-parents and Guardians" (1974) 124 N.L.J. 507.

19 Generally see Bevan, pp.411 to 416. This problem is wider than the relationship between sections 1 and 2 of the 1948 Act and the prerogative jurisdiction: it is relevant not only where a child is in the statutory care of a local authority under whatever Act but also when there is a statute relevant to a dispute affecting the child. It has however been suggested that the relevant principles "are not affected by the method of origin or of termination of the local authority's duties and discretions with regard to children in their care": Re T (AJJ) (An Infant) [1970] 1 All E.R. 512 at p.517 per Ungood-Thomas J.

20 Para.16.3.

detrimental to the child, even assuming that it is technically competent.²¹

16.9 The English Court of Appeal exhibited one interpretation of section 1(3) in 1954²² and a different view in 1969.²³ The progression of the Chancery Division in the intervening period from one view to the other demonstrates what in summary may amount to a changing judicial attitude to child protection²⁴ in the context of local authority fostering arrangements. The approach adopted by Lord Goddard C.J. in In re AB (An Infant)²⁵ may be summed up in four simple propositions:-

- (a) section 1 imposes a positive duty to assume care under certain circumstances;²⁶
- (b) section 13 explains how this duty should be carried out;²⁷
- (c) section 1(3) preserves the rights of parents;²⁸ while

21 There is no reason to suggest that it would not be competent. Indeed in In re AB (An Infant) [1954] 2 Q.B. 385 Lord Goddard C.J. at p.399 implied that this could be done. See also Re S (An Infant) [1965] 1 All E.R. 865 at p.870 per Danckwerts L.J. and at p.871 per Pearson L.J.

22 In re AB (An Infant) [1954] 2 Q.B. 385.

23 Krishnan v London Borough of Sutton [1970] 1 Ch.181.

24 From one giving affect to parental wishes to one acknowledging a substantial administrative discretion.

25 [1954] 2 Q.B. 385.

26 Ibid. at p.394.

27 Ibid. at pp.394 and 395.

28 Ibid. at pp.397 and 398.

(d) section 2 alone enables the local authority to obtain full rights over the child to the exclusion of the parents.²⁹

These propositions were probably not essential to the decision of the court; the conclusion turned more on the relationship between the administrative and prerogative jurisdictions.³⁰ Similar views were expressed in Barker v Westmorland C.C.³¹ and Re M (An Infant).³² The most explicit comment however came from Ungood-Thomas J. in Re G (Infants):³³

"Here L.C.C. [London County Council], as the local authority, received the children into their care under subsection (1)(b) and (c); and under subsection (2) they have continued to keep these children in their care as I have stated. Subsection (3), however, makes it clear that, if either parent desires to take over the care of the children, the L.C.C. cannot retain them against the parent's desire,

-
- 29 Ibid. at p.398: at pp.397 and 398 Lord Goddard C.J. said:- "... the local authority take the child into their care. Having done that, they board it out as the statute directs, but the next thing they have to do is to give the child back to the parent's care if he can look after the child and wants to do so, or endeavour to get the parent to perform his parental duties or find a friend or relative who will do that. If the local authority think that the parent is a person who cannot be trusted to look after the child, then section 2 comes into play." The words emphasised are an addition to the statutory scheme and represent a modification of the duty to give effect to parental wishes. They are inconsistent with Lord Goddard C.J.'s general view of the legislation: cf. para. 14.18.
- 30 Ibid. at p.396 per Lord Goddard C.J. and at p.401 per Donovan J. Generally see Levin J, "The Control of Local Authority Powers over Children" (1971) 1 Family Law 101.
- 31 (1958) 56 L.G.R. 267.
- 32 [1961] Ch.81; [1961] Ch. 328 (C.A.).
- 33 [1963] 3 All E.R. 370.

and further provides that the local authority have a duty, where it appears to them consistent with the welfare of the children, to endeavour to secure that the care of the children is taken³⁴ over by, among other people, a parent."

Clearly, therefore, parental wishes could override the local authority's view of what was best for the child and parental care as a matter of general policy was preferred to any other form of care, subject only to consistency with the welfare of the individual child.

16.10 Finally in 1965 Lord Denning M.R. in Re S (An Infant)³⁵ adopted a position entirely consistent with that of Lord Goddard C.J.³⁶ and Ungood-Thomas J.³⁷ The Master of the Rolls pointed out that the case before him was "a s.l case, in which the local authority have only a transient care of the child, in this sense, that if the natural parents desire to take over the care of the child, the local authority have to give him up".³⁸ He went on to stress the importance of the prerogative wardship jurisdiction,³⁹ particularly where the parental removal of the child from the care of the local authority could be detrimental to the child, by indicating that "in order to avoid this peril and secure the welfare of the child, the jurisdiction of the Court of Chancery must be maintained".⁴⁰

34 Ibid. at p.372 per Ungood-Thomas J. C.f. the views of Lord Goddard C.J. in In re AB (An Infant) [1954] 2 Q.B. 385 at pp.398 and 399 where the local authority's decision, albeit following the parent's wishes, was the fundamental factor. In practice, however, there would be no distinction between the two.

35 [1965] 1 All E.R. 865.

36 In re AB (An Infant) [1954] 2 Q.B. 385.

37 Re G (Infants) [1963] 3 All E.R. 370.

38 [1965] 1 All E.R. 865 at p.867.

39 Ibid. at p.868.

40 Idem.

The technique of Lord Denning M.R. was thus to use every available remedy to secure the welfare of the child, singly or together, particularly where, as here, statute in his view favoured parental rights to the possible detriment of the child. If his view of section 1(3) were correct, he was prepared to use on strictly technical grounds⁴¹ the powers of the Court of Chancery almost in the face of Parliamentary policy.⁴²

16.11 Most of the decisions concerned children received into care by the local authority and subsequently boarded out with foster parents under section 13(1)(a) of the 1948 Act.⁴³ Sometimes the mother would want to resume the care of her child.⁴⁴ Access could be her sole objective.⁴⁵ She might want to give the child to a third party.⁴⁶ Sometimes a third party, perhaps the putative father, might seek the care of the child.⁴⁷ The local authority might even change its view of what was best

41 That statutes do not bind the Crown, acting here as parens patriae through the Court, unless there are express words to that effect.

42 Assuming for the moment that that was to protect parental wishes.

43 1968 Act, s.21(1)(a).

44 Re S (An Infant) [1965] 1 All E.R. 33; Re R (K) (An Infant) [1964] Ch.455.

45 Re G (Infants) [1963] 3 All E.R. 370.

46 In re AB (An Infant) [1954] 2 Q.B. 385.

47 Re C (A) (An Infant) [1966] 1 All E.R. 560.

for the child.⁴⁸ The overall impression is that where the natural parents and the local authority shared the same view on what was best for the child, there were few problems. In the event of conflict between the natural parents and the local authority, problems could arise on the legislation and the relationship between it and the prerogative jurisdiction of the court. This will be considered later but generally the courts will sustain the administrative decision within its statutory limitations. Indeed they may also use their prerogative jurisdiction to support the local authority's decision, sometimes even without considering the merits of that decision. In either case the foster parents would be unprotected. The natural parents' wishes would also be at risk if they conflicted with those of the local authority.

(b) The more recent cases

16.12 Some of the later judicial statements illustrate a different view of the scheme of these statutory provisions. The later view does not benefit either foster parents or natural parents but it more realistically recognises in practice the substantive discretion conferred upon the local authority by modifying the role of the parental wishes in the exercise of that discretion. The issue is again related technically to the extent of the prerogative jurisdiction of the court. The source of the

48 Re M (An Infant) [1961] 1 All E.R. 201 and 788.

current approach may be found in Re R (K) (An Infant)⁴⁹ where the child's mother expressed a desire to assume the care of her child under section 1(3).⁵⁰ The foster parents and the local authority applied to have the child made a ward of court and for care and control to be committed to the foster parents. The mother responded by asking for the child to cease to be a ward of court. Pennycuick J. said:-

"Once the notice [to a county council by a parent under section 1(3) to resume care] has been given, it is I think clear not only that the common law rights of the mother revive, but also that the jurisdiction of this court in relation to the infant becomes fully effective."⁵¹

Wardship was not terminated. The child was left in the care and control of the foster parents pending final determination. The wishes of the child's mother were thus effectively ignored. Under the wardship jurisdiction the court would presumably go on to decide the issue on the paramountcy of welfare principle under what was then in England section 1 of the Guardianship of Infants Act 1925.⁵² The interest of the foster parents would no doubt be relevant at that stage.

16.13 Pennycuick J. reached his decision to some extent on the scope of the court's prerogative jurisdiction in relation to the local authority's administrative powers.

49 [1964] Ch.455.

50 Referred to by Pennycuick J. as "the mother's notice": ibid. at p.461.

51 Ibid. at p.461 and 462. Cf. Lord Denning M.R. in Re S (An Infant) [1965] 1 All E.R. 865 : he would probably have taken the view that the prerogative jurisdiction was never ineffective.

52 15 & 16 Geo. 5, c.45.

What is particularly significant, however, is that the judge went on to consider the policy of the legislation with regard to parents' rights. This included section 1(3). He argued:-

"It would, of course, be right to accept the contention of counsel for the mother [i.e. that she, as the natural parent of the infant, had an unchallengeable right to possession of the infant] if it were clear beyond doubt that this was indeed the intention underlying the Act of 1948. Section 1(3), however, imposes no mandatory obligation to return the infant to the infant's parent. The first limb of subsection (3) merely puts an end to the right of the local authority to keep the child and the second limb of the subsection is applicable only where it appears to the local authority consistent with the welfare of the child to secure that the child's care is taken over by others." ⁵³

He reached this conclusion "with much diffidence" having regard to the extensive quotations in his judgment from In re AB (An Infant).⁵⁴ The crux of the proposition that section 1(3) is not mandatory appears to be founded upon Pennycuick J.'s view of the first limb of subsection (3). There can be no doubt that it puts an end to the local authority's right to keep the child. It takes away the local authority's powers under section 1 only.⁵⁵ This may be a further reason why the prerogative jurisdiction otherwise remains available. Pennycuick J.

53 [1964] Ch.455 at pp.462 and 463.

54 [1954] 2 Q.B. 385.

55 By virtue of the words "nothing in this section".

however gave no substantial justification for his view. It may be that the grammar of subsection (3) is that the local authority's statutory function is taken away (the principal clause) only if a parent desires to take over the care of the child (the subordinate clause). Thus, perhaps, the thrust of the provision is not to give effect to parental wishes but to disable the authority from using section 1. On that basis the non-mandatory nature of subsection (3) becomes more intelligible.

16.14 The issue before Buckley J. in Re C(A) (An Infant)^{5 6} was similar but the circumstances were different. The putative father of a child in the care of Essex County Council and boarded out by them with foster parents sought to have the child made a ward of court and for leave to take him to South Africa. The mother opposed the application and the local authority asked for him to cease to be a ward of court. The local authority's evidence was that they were satisfied that the welfare of the child required that he should remain where he was and in the care of the council. The putative father argued⁵⁷ partly on the basis of the second limb of subsection (3), particularly paragraph (b) which requires the local authority to endeavour to secure that care shall be taken over by a relative (which here would

56 [1966] 1 All E.R. 560.

57 Ibid. at p.564.

include the putative father)⁵⁸ or a friend. The second limb is much more discretionary than the first limb, for it requires the local authority to be so satisfied in terms of the welfare test. This enabled Buckley J. to decide in favour of the local authority almost entirely on the basis of their view of the child's welfare.⁵⁹

16.15 Buckley J. took the same view of the scope of the prerogative jurisdiction as Pennycuick J. in Re R (K) (An Infant).⁶⁰ The former judge accepted that:-

"the court could accept the guardianship of the child with a view to regulating matters such as these [i.e. giving directions with regard to the child's property, or, possibly, in relation to the child's marriage, or to the child's going out of the jurisdiction] in so far as they fell outside the sphere of the local authority's responsibilities. So, too, if the case were one in which there appeared to be an immediate probability or an early likelihood of a parent requiring the local authority to transfer the child into the care of that parent under s.1(3) of the Act of 1948, for in such a case the local authority's power in respect of the child would thereupon come to an end and in consequence there would be a prospective field in which the prerogative jurisdiction of the court might be usefully employed."⁶¹

The judgments of Pennycuick and Buckley JJ. seem therefore to have modified the earlier views⁶² on the scope of the

58 1948 Act, s.59(1), paragraph (b) of the definition of "relative".

59 [1966] 1 All E.R. 560 at p.564.

60 [1964] Ch.455.

61 [1966] 1 All E.R. 560 at p.564 per Buckley J.

62 Paras.16.7 to 16.11.

prerogative jurisdiction in a way not inconsistent with these earlier views.⁶³ Partly in response to this and partly as a consequence of a different interpretation of section 1 of the 1948 Act, the approach to section 1(3) has also been modified. It is now less rigid, more discretionary and, in a sense, more consistent with the administrative nature of the functions conferred upon the local authority. Pennycuik J.'s view was more fundamental than Buckley J.'s attitude simply because the former discussed the first limb of subsection (3) in this context, and the latter placed more weight upon the second limb. The Court of Appeal⁶⁴ has subsequently endorsed Pennycuik J.'s interpretation.

(c) Policy, the Court of Appeal and the Court of Session

(i) Policy

16.16 Before examining the Court of Appeal's judgment, there is a further argument relevant to this discussion but one largely ignored by the courts. Section 12(1) of the 1948 Act and section 20(1) of the 1968 Act set out the general duty of the local authority towards children

63 The new approach is not inconsistent with the older approach for it operates in addition to not in substitution for it.

64 Krishnan v London Borough of Sutton [1970] 1 Ch.181.

in their care.⁶⁵ There is no doubt that these provisions applied to children received into care under section 1 of the 1948 Act and section 15 of the 1968 Act.⁶⁶ It is axiomatic but important to emphasise that it applies to children actually in care. It would therefore not apply if care was no longer authorised; for example, under the first limb of subsection (3). It may however be argued that if subsection (3) were mandatory, section 12(1) would be irrelevant, for, as soon as the parent were to give notice of his wishes, the local authority would no longer have any function to which section 12 would relate. On the other hand, if subsection (3) were not absolute, arguably there would be powers to which section 12(1) would refer. The most fundamental question however is whether section 12(1) is part of the scheme of the Act relevant to and so available to assist in an interpretation of section 1(3). There is no judicial answer to this question. It is suggested that, if it is proper to regard section 12(1) as illustrating the fundamental policy of the legislation in regard to children in care, it indicates a welfare approach rather than a parental rights attitude.

65 It was "to exercise their powers with respect to him [the child in their care] so as to further his best interests, and to afford him opportunity for the proper development of his character and abilities". The reference to "powers" is important in the present context. These provisions were superseded in 1975 when a new duty was formulated in relation to children in care: Children Act 1975, ss.59 and 79. But that does not affect the argument in this paragraph.

66 The 1968 Act, s.20(1) so provides specifically. The 1948 Act, s.11 similarly provides but in a much more complex fashion.

16.17 An analogous argument may be found in related provisions which tend to indicate how that objective may be achieved. They include in particular what use may be made of what may generically be called "parental resources".⁶⁷ This phrase is used to distinguish it from "parental rights". Subsections (2) of section 12 of the 1948 Act and of section 20 of the 1968 Act enact that in providing for a child in their care, "a local authority shall make such use of facilities and services available for children in the care of their own parents as appears to the local authority reasonable in his case".⁶⁸ Clearly this contemplates parents as a source of care not as recipients of a statutory benefit. If subsection (3) of section 1 of the 1948 Act were not regarded as mandatory, thus giving the local authority a discretion in relation to a parent's desire to take over the care of the child, it would be juristically similar to subsection (2) of sections 12 and 20. The existence of these provisions does not require a flexible attitude to subsection (3) but it is, it is suggested, entirely consistent with such an attitude. The arguments set forth in the last

67 The 1968 Act, s.12(1) and (2)(a) in Scotland and the Children and Young Persons Act 1963, s.1(1) in England require the local authority to make available advice, guidance and assistance where such assistance appears to the local authority likely to diminish the need to receive into or keep in care a child under the Act. This provides a more general method of providing for children in care. Presumably the assistance may be made available to the parents and as such would be another but different example of "parental resources".

68 These provisions were not amended in 1975.

two paragraphs have not apparently been used in an attempt to unravel the meaning of subsection (3). They are not conclusive but they may conceivably be of more than peripheral relevance.

(ii) The Court of Appeal

16.18 Procedurally Krishnan v London Borough of Sutton⁶⁹ was a complicated case.⁷⁰ But the intention of the father of the child in care under section 1(1) and boarded out by the council was clear beyond doubt: the return of his daughter. The child in care was a girl of fourteen whose parents were unable to accommodate and maintain her.⁷¹ Circumstances changed. The father requested his daughter's return. The local authority notified the foster parents accordingly but the child was unwilling to return to her father and remained with the foster parents.⁷² What makes this case rather unusual, therefore, is that the dispute was not so much between the parent and the local authority⁷³ but between the parent and his daughter. These circumstances placed the local authority and foster parents in an extremely difficult position.⁷⁴

69 [1970] 1 Ch.181.

70 The plaintiff took out an originating summons for an order against the local authority to deliver the child in terms of section 1(3) of the 1948 Act. By interlocutory motions he sought two interim injunctions which were refused and formed the subject of the appeal to the Court of Appeal. Earlier he had attempted to have his daughter made a ward of court but this was refused by Buckley J. and on appeal by the Court of Appeal.

71 [1970] 1 Ch. 181 at p.183: the details are not reported.

72 Ibid. at p.183.

73 Although that was the technical form of the action.

74 They could not give effect to the parent's wishes without using force.

16.19 The child's father had earlier attempted unsuccessfully to have the child made a ward of court. Subsequently he brought proceedings against the local authority, seeking an order for the return of the child and alleging conspiracy between the local authority and the foster parents to deprive him of the child. Two motions for interim injunctions were the subject of the appeal in question: one ordering the local authority to remove the child from the foster parents' home and to return her to him; and the second restraining the authority from harbouring the girl against his will.⁷⁵

The second is of no current relevance. Since the remedy sought was equitable, the issue was not simply the nature of the statutory provision but also the desirability of granting a discretionary relief. The point of fundamental concern in this chapter arose only obliquely, as a consequence of the procedural complexities of English law.

16.20 The judgment of Goff J.⁷⁶ is in some respects more illuminating than the judgments of the Court of Appeal.⁷⁷ He suggested that the court in In re AB (An Infant)⁷⁸ had accepted that "the first limb of subsection (3) imported a mandatory obligation to return the child".⁷⁹

75 [1970] 1 Ch.181 at p.183.

76 Ibid. at pp.184 to 188.

77 Ibid. at pp.190 to 193: Megaw, Russell and Harman L.JJ.

78 [1954] 2 Q.B. 385: para. 16.9.

79 [1970] 1 Ch.181 at p.185 per Goff J.

But he did not think that that could be "quite right";⁸⁰ he preferred the construction adopted by Pennycuik J. in In re R (K) (An Infant).⁸¹ Goff J. continued:-

"I need not consider what difficulties may arise where a parent desires the return of the child and the local authority in the exercise of its discretion does not consider it consistent with the welfare of the child that it should be so returned or returned to any of the other classes of persons mentioned in subsection (3). In practice, the local authority would probably make an order under section 2 ..."⁸²

His reluctance to consider that point further is unfortunate. It is an issue of considerable importance, for the use of section 2 may not always be justified.⁸³

16.21 That apart, Goff J. clearly took the view that section 1(3) did not impose a mandatory duty to return the child to the parent. In a sense, however, even that proposition was not essential to his judgment, for there was no question that the local authority were willing to return the child to the parent. The problem was enforcement of that decision. It is suggested, therefore, that Goff J. was correct when he indicated that "the duty under the second part of the section has arisen".⁸⁴ The question then was what order, if any, should be made against the local authority. The decision thus turned on the second limb of subsection (3). Perhaps his comments

80 Idem.

81 [1964] Ch.455.

82 [1970] 1 Ch.181 at pp.185 and 186 per Goff J.

83 E.g. Cheetham v Glasgow Corporation 1972 S.L.T. (Notes) 50.

84 [1970] 1 Ch.181 at p.186. Emphasis added. It is suggested however that Goff J. meant "subsection" not "section"; otherwise his statement is meaningless.

on the subsection as a whole are dicta only. It was thus entirely reasonable to refuse the motion for an interim injunction, for the order could only be that the authority should endeavour to return the child.⁸⁵ Such an order would lack specificity and should not therefore be made. Although Goff J. advanced further reasons against exercising the discretion sought, they are not presently relevant.

16.22 The attitude of the Court of Appeal to section 1(3) was clear beyond doubt but there was no supporting justification. Megaw L.J. stated:-

"In my judgment, there is one simple answer to the plaintiff's appeal, and that is this, that, on the true construction of the relevant statute, there is no absolute duty upon the local authority to hand over the child: the local authority may not, therefore, be ordered by the court under or by virtue of the statute, to hand over the child regardless of circumstances. It is, in my judgment, in the circumstances of this case, impossible for this court to make this order. In my judgment, In re R (K) (An Infant),⁸⁶ decided by Pennycuik J., which is cited by the judge, is right, and its effect is that section 1(3) of the Children Act 1948 imposes no mandatory obligation to return the infant to its parents."⁸⁷

85 I.e. a reflection of the statutory provision.
Emphasis added.

86 [1964] Ch.455.

87 [1970] 1 Ch.181 at pp.191 and 192.

This conclusion, it is suggested, is correct for three reasons. Firstly, it is consistent with the administrative flexibility of the Act as a whole. It is also consistent with the policy in section 12(1) which sets out the general duty of the local authority towards children in care and with what has been described as the use of "parental resources" in implementing that policy. Finally, the grammatical structure of subsection (3), if it is read as a whole and not as two unrelated parts, indicates that the second limb is the effective provision and the first limb merely renders the powers in the second limb available when the local authority's authorisation to receive the child into their care terminates. This implies that a further decision to receive the child into care again is a competent substitute for the other possibilities set out in paragraphs (a) and (b) of subsection (3).⁸⁸

(iii) The Court of Session

16.23 The attitude of the English courts towards section 1(3) of the 1948 Act has at last crystallised. In a sense it is a byproduct of the relationship between prerogative powers and statute. The Scottish courts have not needed to contend with that particular difficulty.⁸⁹ Their problems are different; they tend to be matters of interpretation alone. But even Cheetham v Glasgow Corporation and others⁹⁰ had a long and complicated background. In essence the parents of a child in the

88 Para.16.8.

89 There is no concept of wardship in Scotland.

90 1972 S.L.T. (Notes) 50.

care of Glasgow Corporation under section 15 of the 1968 Act and boarded out by the Corporation with foster parents wanted their child returned to them.

A petition by the foster parents for adoption had been refused⁹¹ and an application by the local authority for an order under section 16 of the 1968 Act had also failed.⁹²

The parents ultimately presented a petition to the Outer House of the Court of Session for custody.⁹³

Lord Dunpark applied the paramountcy of welfare principle,⁹⁴ concluded that the child's best interests lay with the foster parents and refused the petition.

16.24 No jurisdictional problems, such as those in England,⁹⁵ arose. The existence of an impediment upon the courts created by the statutory scheme conferring administrative functions upon another body was not even contemplated. However one sentence in Lord Dunpark's opinion indicates what his attitude would have been if such an issue had been raised. He looked at the effect of a judicial order upon the local authority rather than

91 The mother had refused her consent (now termed agreement) and it was held not to have been unreasonable.

92 1968 Act, s.16(3). The threshold requirements had not been fulfilled : i.e. proof of parental unfitness and persistent failure to discharge parental obligations.

93 Not, it should be noted, for delivery : i.e. for enforcement of their legal rights.

94 Guardianship of Infants Act 1925, s.1.

95 E.g., the conflict between the wardship jurisdiction and the statutory scheme conferring functions upon the local authority.

at the consequences of the legislation.⁹⁶ As he said:-

"If I make an order for custody in the Laws' [the foster parents'] favour, it will extinguish the legal duties now incumbent upon the Corporation, who have the child in their care under s.15(2) of the Social Work (Scotland) Act 1968"⁹⁷

This view gives an order of the court priority over the statutory decision of a local authority. If this is the position, it would contrast with the situation in England, particularly in the older cases. The position in each of the two jurisdictions is fundamentally different in any event, for the Chancery (now Family) Division of the High Court merely exercises the functions of the Court of Chancery which derived its powers from the Chancellor who was himself a mere delegatus of the Crown as parens patriae. The foundation of the position of the court in England is principally administrative. None of this historical background applies to the Court of Session.⁹⁸ Thus in England the contest is more between two administrative bodies; in Scotland it is rather between an administrative and a judicial body. Too much weight should not be placed upon this argument. The technical argument sometimes used by the English courts, that the Crown is not bound by statute unless expressly stated to to be bound,⁹⁹ is weaker, if indeed applicable, in

96 In a sense this is the reverse of the English attitude. Lord Dunpark more or less assumed the superiority of the court over the local authority and discounted the statutory position of the local authority as the creation of Parliament.

97 1972 S.L.T. (Notes) 50 at pp.50 and 51 per Lord Dunpark.

98 Paras. 32.3, 32.61, 32.62, 32.63.

99 Maxwell, p. 161.

Scotland.¹ Arguably this could point to a considerable difference between the two systems.

16.25 That issue apart, Lord Dunpark reached his conclusion² upon an interpretation of section 1 of the Guardianship of Infants Act 1925. Following J v C³ he took the view that section 1 "applied to all disputes over the custody of children and was not limited to disputes between parents".⁴ That presumably would include disputes to which statutory authorities were parties. It can thus readily be understood why Lord Dunpark felt able to determine the dispute on its welfare merits. On the face of it, J v C⁵ was a similar case, for there the child whose custody was sought by parents and foster parents was in the care of a local authority under section 1 of the 1948 Act.⁶ The local authority itself took the initiative in having the child made a ward of court and then, in apparent contrast with the other cases, asked for directions for custody, care and control of the child. In a sense, therefore, the local authority "delegated" its function to the court. But in doing so it could be open to criticism on the ground of failure to perform its statutory duty.

1 Somerville v Lord Advocate (1893) 20 Rettie 1050 at pp.1070 and 1071 per Lord Kyllachy; Magistrates of Edinburgh v Lord Advocate 1912 S.C. 1085 at p.1091 per Lord Dunedin L.P.

2 On the question whether he could "award legal custody of this child to his foster parents" : 1972 S.L.T. (Notes) 50 at p.50.

3 [1970] A.C. 668: para 43.39.

4 1972 S.L.T. (Notes) 50 at p.50 per Lord Dunpark summarising the House of Lords' decision in J v C [1970] A.C. 668.

5 [1970] A.C. 668.

6 That fact played no part in the case, for the local authority asked the court to deal with custody, care and control.

16.26 Lord Dunpark gave his opinion of what section 15(3) of the 1968 Act meant. This was clearly not essential to his decision. The application of the paramountcy of welfare principle is probably a matter of discretion.⁷ To have taken the view that section 15(3) was mandatory in requiring the local authority to return the child to his parents at their request would arguably have conflicted directly with the discretion of the welfare doctrine. He did not however take that view:-

"... I read the clause in subs.(3) of s.15 of the Social Work (Scotland) Act 1968, saving the right of a parent or guardian to take over the care of the child in the care of a local authority, as subject to the overriding duty imposed upon the local authority by subs.(2) of the said section 'to keep the child in their care so long as the welfare of the child appears to them to require it! This interpretation of s.15 is consistent with English authority (see Krishnan v Sutton London Borough Council⁸ and with the decisions taken by Glasgow Corporation in this case"

Lord Dunpark supported his argument with more detailed analysis than the English judges. His approach is similar to but less general than the arguments adopted earlier in this chapter. It would appear overall that his reliance upon statutory policy to interpret an ambiguous provision in a way consistent with that policy is fundamentally correct.

7 Paras. 35.92 to 35.96.

8 [1970] Ch.101.

9 1972 S.L.T. (Notes) 50 at p.51 per Lord Dunpark.

Section 4 - Conclusion

16.27 This comparative analysis of the English and Scottish cases throws into sharp relief the impact of detailed interpretation upon the concept of welfare generally and the welfare of the individual child. If the first limb of section 1(3) of the 1948 Act were treated as mandatory, it would involve, at least at face value, giving effect to parental wishes. The child's welfare would be liable to be overridden by the parents' attitude. The parents, of course, might well be justified in seeking the child's return, but their decision would be virtually unchallengeable. On the other hand, if the first limb of section 1(3) were not absolute but subject to the general policy of the Act, the situation would be governed by the local authority's statutory responsibilities in general. They are clearly directed towards the welfare of the child. The scheme of the Act has been relatively widely drawn and the concept of welfare implies on a purely semantic level a considerable interpretational flexibility. The alternative approach is thus much more consistent with the welfare principle.

16.28 It could be argued that the alternative approach merely substitutes the local authority's view of welfare for that of the parent. The local authority's decision would be as unchallengeable as that of the parent. Neither proposition is entirely valid. The protection and promotion of the child's welfare is the fundamental statutory objective of the local authority. The parents' decision-making process is not similarly circumscribed. Depending

on the meaning of subsection (3), for example, the parents' position may be governed partially by the local authority's attitude. In both jurisdictions the courts exercise to some extent a form of overall control.

16.29 The second feature of this comparative analysis, which in a sense is a generalisation of the last point discussed, indicates that the law is concerned principally with the question to whom the decision on the child's welfare is confided. There is probably no simple answer. It is obviously a matter of extreme importance to the child who makes the decision. In the English context the issue is complicated by historical factors. In the absence of mala fides and within its statutory limitations the decision of the local authority is probably supreme.¹⁰ The court will otherwise intervene only in support of the local authority¹¹ or at the request of the local authority.¹² The most extreme position would be that of Lord Denning M.R.: namely, the wardship jurisdiction would always be available unless specifically abrogated by statute. In that sense the jurisdiction would operate as a general and overriding supervisory jurisdiction protecting the child's welfare. The parents' position would be pro tanto attenuated. In Scotland it may be that the courts will accept final

10 This is a summary of the earlier English cases: paras. 16.7 to 16.11; Levin J. "The Control of Local Authority Powers over Children" (1971) 1 Family Law 101.

11 E.g. Re R (K) (An Infant) [1964] Ch.455.

12 E.g. J v C [1970] A.C. 668.

responsibility for the welfare of the child and are prepared, almost against any person or body, either parent, foster parent, step-parent, relative, friend, voluntary association or statutory authority, to investigate and decide upon the merits of the individual case. This is restricted to a determination by the court of the person most likely to protect and promote the welfare of the child. In Scotland, unlike England, the court has never fully accepted responsibility for the day-to-day decisions affecting the child. If that is so, the Scottish position would be more consistent with the Denning approach. The desirability of any of these positions is another matter but there seems to be a real possibility that the role of the courts in the two jurisdictions is different.¹³

13 This is also true to some extent in the custodial context.